

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) JULY 17, 2019
 ELIZABETH A. HOLMES AND RAMESH)
 SUNNY BALWANI,) PAGES 1 - 64
)
 DEFENDANTS.)
 _____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN BOSTIC
ROBERT LEACH
JEFFREY SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: KEVIN M. DOWNEY
LANCE WADE
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20005

LAW OFFICE OF JOHN D. CLINE
BY: JOHN D. CLINE
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SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT BALWANI: DAVIS, WRIGHT & TREMAINE LLP
BY: STEPHEN CAZARES
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111

CORR CRONIN LLP
BY: STEVEN FOGG
1001 FOURTH AVENUE, SUITE 3900
SEATTLE, WASHINGTON 98154

1 SAN JOSE, CALIFORNIA

JULY 17, 2019

2 P R O C E E D I N G S

3 (COURT CONVENED AT 10:03 A.M.)

4 THE COURT: SO LET'S CALL OUR MORNING CALENDAR.

5 THIS IS 18-258, UNITED STATES VERSUS ELIZABETH HOLMES AND
6 RAMESH BALWANI.

7 IF I COULD HAVE THE APPEARANCES, PLEASE.

8 MR. BOSTIC: GOOD MORNING, YOUR HONOR. JOHN BOSTIC,
9 JEFF SCHENK, AND ROBERT LEACH FOR THE UNITED STATES.

10 THE COURT: THANK YOU. GOOD MORNING.

11 MR. LEACH: GOOD MORNING, YOUR HONOR.

12 MR. SCHENK: GOOD MORNING.

13 MR. DOWNEY: GOOD MORNING, YOUR HONOR. KEVIN DOWNEY
14 ON BEHALF OF ELIZABETH HOLMES, AND MY PARTNER, LANCE WADE, IS
15 WITH ME AS WELL AS JOHN CLINE.

16 THE COURT: THANK YOU. GOOD MORNING. YOUR CLIENT
17 IS PRESENT AS WELL.

18 MR. DOWNEY: AND THE CLIENT IS PRESENT AS WELL, YOUR
19 HONOR.

20 MR. COOPERSMITH: GOOD MORNING, YOUR HONOR.
21 JEFF COOPERSMITH FOR MR. BALWANI. MY COLLEAGUES, STEVE CAZARES
22 AND STEVE FOGG, ARE WITH MR. BALWANI AS WELL, WHO IS PRESENT AS
23 WELL.

24 THE COURT: THANK YOU. GOOD MORNING EVERYONE.

25 I DID RECEIVE A LETTER JUST A MOMENT AGO, AND LET ME

10:03AM 1 INDICATE I DID RECEIVE DOCKET 189, WHICH IS YOUR STATUS
10:03AM 2 MEMORANDUM, AND THANK YOU FOR THAT. THAT WAS VERY HELPFUL.

10:03AM 3 I ALSO HAVE REVIEWED SOME OTHER DOCUMENTS INCLUDING 6721,
10:04AM 4 WHICH WAS A PROPOSED ORDER BY THE DEFENSE REGARDING A RULE 16
10:04AM 5 REQUEST.

10:04AM 6 I'VE ALSO LOOKED AT THE STIPULATION AND PROPOSED
10:04AM 7 SUPPLEMENTAL PROTECTIVE ORDER THAT WAS REFERENCED IN SOME
10:04AM 8 LETTERS. I'VE READ THE LETTERS THAT WERE ATTACHED TO THE
10:04AM 9 SUPPLEMENTAL MEMORANDUM, YOUR STATUS MEMORANDUM.

10:04AM 10 AND THEN JUST A MOMENT AGO I WAS HANDED ANOTHER LETTER
10:04AM 11 FROM I THINK IT WAS CMS.

10:04AM 12 MR. BOSTIC, THAT CAME FROM YOU, I BELIEVE.

10:04AM 13 MR. BOSTIC: YES, YOUR HONOR. WE RECEIVED THAT JUST
10:04AM 14 A FEW MINUTES BEFORE I SENT IT TO THE COURT.

10:04AM 15 THE COURT: THANK YOU VERY MUCH. SO WHY DON'T I GET
10:04AM 16 AN UPDATE, IF THERE IS ANYTHING TO UPDATE, SUPPLEMENTAL TO YOUR
10:04AM 17 MEMORANDUM, YOUR STATUS.

10:04AM 18 MR. WADE: YOUR HONOR, IF I COULD MAKE AN INQUIRY.
10:04AM 19 I'M NOT SURE I'M AWARE OF THE CMS CORRESPONDENCE THAT YOU
10:04AM 20 REFERRED TO.

10:04AM 21 THE COURT: OH.

10:05AM 22 MR. BOSTIC: SO, YOUR HONOR, WHEN CMS SENT THAT BY
10:05AM 23 E-MAIL THIS MORNING, I BELIEVE COUNSEL FOR MS. HOLMES WERE CC'D
10:05AM 24 ON THAT E-MAIL, BUT IT DID JUST COME IN IN THE LAST 45 MINUTES
10:05AM 25 OR SO.

10:05AM 1 THE CLERK: I CAN PRINT.

10:05AM 2 THE COURT: WE CAN GET A PRINTED COPY FOR YOU.

10:05AM 3 MR. WADE: I'LL CHECK MY E-MAIL, YOUR HONOR.

10:05AM 4 MR. BOSTIC: I SEE NOW, YOUR HONOR, IT WAS SENT TO

10:05AM 5 MYSELF FOR THE GOVERNMENT, MR. COOPERSMITH FOR MR. BALWANI, AND

10:05AM 6 MR. DOWNEY FOR MS. HOLMES.

10:05AM 7 MR. COOPERSMITH: IT TEACHES ME TO TURN OFF MY PHONE

10:05AM 8 FOR COURT I GUESS, YOUR HONOR, BUT I'LL CHECK IT.

10:05AM 9 THE COURT: UPDATE YOUR BROWSERS. WE'LL HAVE COPIES

10:05AM 10 FOR YOU IN JUST A MOMENT OF THE E-MAIL.

10:06AM 11 (PAUSE IN PROCEEDINGS.)

10:06AM 12 THE CLERK: (HANDING).

10:06AM 13 THE COURT: THIS IS JULY 17TH, 2019, A TWO PAGE

10:06AM 14 LETTER.

10:06AM 15 MR. WADE: WE HAVE IT NOW, YOUR HONOR. THANKS TO

10:06AM 16 THE COURT. WE'LL TAKE A FEW MOMENTS TO READ.

10:06AM 17 THE COURT: OF COURSE.

10:06AM 18 (PAUSE IN PROCEEDINGS.)

10:07AM 19 MR. WADE: WE'RE PREPARED TO PROCEED, YOUR HONOR.

10:07AM 20 THE COURT: ALL RIGHT. EVERYONE HAS READ THIS. HOW

10:07AM 21 ABOUT AN UPDATE, MR. BOSTIC?

10:07AM 22 MR. BOSTIC: SO, YOUR HONOR, AS THE COURT KNOWS, AT

10:07AM 23 THE TIME OF THE LAST HEARING THE AGENCIES WERE TELLING THE

10:07AM 24 PARTIES THAT THE MAIN OBSTACLES TO THEIR PRODUCING CERTAIN

10:07AM 25 CATEGORIES OF DOCUMENTS WERE THE REQUIREMENT FOR A PROTECTIVE

1 ORDER IN THIS CASE AND A WAIVER FROM THE ASSIGNEE CONTROLLING
2 THERANOS'S RIGHTS.

3 THOSE TWO OBSTACLES HAVE BEEN OVERCOME AS THE COURT SAW IN
4 THE JOINT STATUS UPDATE. I'M NOT AWARE OF ANY SIGNIFICANT
5 CHANGES SINCE THE PARTIES MADE THEIR SUBMISSIONS ON MONDAY, BUT
6 IF THE COURT WOULD LIKE, I'M ABLE TO SUMMARIZE THE PROGRESS
7 THAT HAS BEEN MADE OVER THE LAST TWO WEEKS SINCE THE JUNE 28TH
8 HEARING.

9 THE COURT: WELL, I'VE CAPTURED THAT IN THE MEMO SO
10 THAT'S FINE. YOU DON'T NEED TO REPEAT ANY OF THAT.

11 I GUESS THE QUESTION THAT COMES TO MIND IMMEDIATELY IS
12 WHETHER OR NOT I SHOULD SIGN THE, I THINK IT'S THE CORRECTIVE
13 PROTECTIVE ORDER.

14 WHAT IS THE POSITION OF THE DEFENSE ON THAT?

15 MR. WADE: WE'VE CONFERRED WITH THE GOVERNMENT AND
16 WITH COCOUNSEL ON THE PROTECTIVE ORDER AND IT ADDRESSES VARIOUS
17 ISSUES. THE GOVERNMENT HAS BEEN ACCOMMODATING IN ADDRESSING
18 OURS, AND WE'VE TRIED TO BE EQUALLY AS ACCOMMODATING.

19 WE HAVE NO OBJECTION TO THAT ORDER.

20 THE COURT: ALL RIGHT.

21 MR. BOSTIC: AGREED, YOUR HONOR. I THINK SIGNING OF
22 THE PROTECTIVE ORDER WILL FACILITATE PRODUCTION OF THESE
23 DOCUMENTS.

24 THE COURT: I HAVE A COPY IN MY HAND THAT I AM GOING
25 TO HAND DOWN TO YOU. I JUST WANT TO MAKE SURE I AM GOING TO

10:08AM 1 SIGN THE CORRECT DOCUMENT THAT YOU ALL HAVE AGREEMENT TO.

10:08AM 2 MAYBE I'LL GET A CLEAN COPY THAT IS NOT ON THIS.

10:08AM 3 MR. CAZARES: YOUR HONOR, IF I MAY JUST TO MAKE ONE
10:08AM 4 THING CLEAR. IT'S MY UNDERSTANDING THAT THE PROTECTIVE ORDER
10:08AM 5 THAT THE PARTIES HAVE AGREED UPON IS ACCEPTABLE TO THE PARTIES
10:08AM 6 AND IS NOT, HOWEVER, YOU KNOW, SIGNED OFF YET BY THE ASSIGNEE.
10:08AM 7 THEY HAVE NOT NECESSARILY AGREED AT THIS POINT TO PRODUCE
10:08AM 8 DOCUMENTS OR AGREED TO THE PRODUCTION PURSUANT TO THE TERMS AS
10:09AM 9 CONTAINED IN THIS PROTECTIVE ORDER.

10:09AM 10 THE COURT: OKAY. THANK YOU.

10:09AM 11 MR. BOSTIC: SO, YOUR HONOR, TO CLARIFY ON THAT
10:09AM 12 POINT. THE MOST RECENT VERSION, AS I THINK THE COURT IS AWARE,
10:09AM 13 THE GOVERNMENT DRAFTED THIS PROTECTIVE ORDER, NEGOTIATED WITH
10:09AM 14 SEVERAL PARTIES TO MAKE SURE IT WAS ACCEPTABLE TO EVERYBODY,
10:09AM 15 INCLUDING THE TWO SETS OF DEFENSE COUNSEL, THE TWO GOVERNMENT
10:09AM 16 AGENCIES, AS WELL AS COUNSEL FOR THE ASSIGNEE.

10:09AM 17 THE MOST RECENT VERSION THAT THE ASSIGNEE REVIEWED WAS
10:09AM 18 PROBABLY ONE VERSION AGO. I'LL REPRESENT TO THE COURT AND TO
10:09AM 19 DEFENSE COUNSEL THAT I DON'T BELIEVE THERE HAVE BEEN ANY
10:09AM 20 CHANGES TO THE PROTECTIVE ORDER SINCE THEN THAT WOULD AFFECT
10:09AM 21 THE ASSIGNEE'S AGREEMENT TO ISSUE A WAIVER UNDER THE ORDER.

10:09AM 22 THE COURT: SO THIS DOCUMENT THAT I HAVE IN MY HAND
10:09AM 23 THAT I'M PREPARED TO SIGN NOW YOU BELIEVE WILL ALLOW ALL OF THE
10:09AM 24 PROCESS WE TALKED ABOUT BACK IN JUNE AND THAT YOU IDENTIFIED IN
10:09AM 25 YOUR MEMORANDUM TO GO FORWARD, THAT IS, THE PRODUCTION AND THE

10:09AM 1 RELEASE OF THE INFORMATION SIMULTANEOUSLY?

10:09AM 2 MR. BOSTIC: I DO, YOUR HONOR. TO THE EXTENT THAT A
10:10AM 3 PROTECTIVE ORDER IS ABLE TO OVERCOME THE OBSTACLES THAT THE
10:10AM 4 AGENCIES WERE FACING, THIS IS THE PROTECTIVE ORDER TO DO THAT.

10:10AM 5 MR. WADE: YOUR HONOR, I'M SURE WE'LL GET TO THIS.
10:10AM 6 SIGNIFICANT OBSTACLES REMAIN. WE ARE -- THIS ORDER WILL HELP
10:10AM 7 EXPEDITE THE PRODUCTION OF SOME MATERIALS.

10:10AM 8 WE HAVE REVIEWED IT. WE UNDERSTAND IT'S THE SAME AS THE
10:10AM 9 ORDER THAT WAS SUBMITTED WITH THE STATUS REPORT, AND WE WOULD
10:10AM 10 AGREE THAT IT'S APPROPRIATE TO SIGN THAT.

10:10AM 11 THE COURT: OKAY.

10:10AM 12 MR. CAZARES: AGREED, YOUR HONOR.

10:10AM 13 THE COURT: OKAY. ANYONE WISH TO BE HEARD FURTHER
10:10AM 14 ON THIS?

10:10AM 15 MR. WADE: NO.

10:10AM 16 THE COURT: OKAY. ALL RIGHT. WELL, I'LL SIGN THIS,
10:10AM 17 AND WE HOPE IT HAS THE EFFECT INTENDED.

10:11AM 18 ALL RIGHT. THANK YOU. LET'S GO THROUGH -- AND WE'LL HAVE
10:11AM 19 THAT FILED ACCORDINGLY.

10:11AM 20 LET ME GO THROUGH SOME OTHER ISSUES THAT REMAIN. LET ME
10:11AM 21 FIRST ASK THE GOVERNMENT, ARE THERE ANY ISSUES THAT YOU WOULD
10:11AM 22 LIKE TO BRING UP, MR. BOSTIC, YOUR TEAM?

10:11AM 23 MR. BOSTIC: YOUR HONOR, I THINK I WILL HAVE SOME
10:11AM 24 RESPONSES TO THE POINTS THAT I EXPECT THE DEFENSE TO RAISE, BUT
10:11AM 25 I'LL RESERVE COMMENTS UNTIL THEN.

10:11AM 1 THE COURT: OKAY. ALL RIGHT. LET'S TURN TO THE
10:11AM 2 DEFENSE THEN.

10:11AM 3 MR. WADE: JUST SO I'M CLEAR WITH THE COURT, WE'RE
10:11AM 4 STILL ON THE RULE 16 ISSUE HERE? WE'RE NOT MOVING ON TO
10:11AM 5 SCHEDULING AND OTHER ITEMS YET?

10:11AM 6 THE COURT: CORRECT. CORRECT.

10:11AM 7 MR. WADE: YOUR HONOR, WE'RE BEFORE THE COURT FOR
10:11AM 8 THE THIRD TIME ON THIS ISSUE, AND ALTHOUGH A LOT HAS BEEN
10:12AM 9 WRITTEN, I'M NOT SURE MUCH HAS ACTUALLY BEEN SAID TO GIVE
10:12AM 10 ASSURANCES THAT THE CATEGORIES OF DOCUMENTS THAT WE SEEK WILL
10:12AM 11 BE PRODUCED.

10:12AM 12 WE THINK IT'S CLEAR FROM WHAT IS BEFORE THE COURT THAT AN
10:12AM 13 ORDER IS NECESSARY TO ENSURE FULL COMPLIANCE WITH THE ORDER AND
10:12AM 14 TO ENSURE THE TIMELY COMPLIANCE WITH THE ORDER.

10:12AM 15 THE COURT: SO THE ORDER THAT YOU'RE SEEKING, AND WE
10:12AM 16 TALKED ABOUT THIS LAST TIME --

10:12AM 17 MR. WADE: YES.

10:12AM 18 THE COURT: -- IS AN ORDER TO THE GOVERNMENT TO
10:12AM 19 PRODUCE THIS INFORMATION?

10:12AM 20 MR. WADE: YES.

10:12AM 21 THE COURT: SO I'M JUST CURIOUS, AND IT JUST SEEMS
10:12AM 22 TO ME, AND PARDON ME FOR THIS ACADEMIC EXERCISE, IT JUST SEEMS
10:12AM 23 TO ME THAT IF THE AGENCIES THEMSELVES WERE PRESENT BEFORE THE
10:12AM 24 COURT OR UNDER THE JURISDICTION OF THE COURT SOMEHOW, THE COURT
10:12AM 25 COULD, AS I SAID LAST TIME WE WERE TOGETHER WHEN I SUGGESTED

1 INVITING THE ATTORNEYS OF THOSE AGENCIES TO SAN JOSE TO TALK TO
2 US ABOUT THE PRODUCTION, THAT SEEMS TO BE MORE FRUITFUL THAN
3 HAVING THE GOVERNMENT, ORDERING THE GOVERNMENT TO ACT AS A
4 CONDUIT TO THOSE TWO LAWYERS.

5 I'M NOT GOING TO ASK YOU WHY OR IF OR WHY NOT OR WHY DON'T
6 YOU ISSUE 17 SUBPOENAS. THAT'S YOUR PROVINCE.

7 BUT IT SEEMS TO ME THAT TO HAVE -- FOR THE COURT TO
8 EXERCISE JURISDICTION OVER THOSE AGENCIES, THAT MIGHT BE THE
9 MOST EFFICIENT WAY TO GO.

10 AND THE QUESTION IS CAN I DO THAT NOW? THAT IS, INSTEAD
11 OF ORDERING THE GOVERNMENT TO PRODUCE, CAN I ORDER THE AGENCIES
12 DIRECTLY, WITHOUT THEM BEING ACTIVELY INVOLVED IN THIS CASE
13 PURSUANT TO A 17 SUBPOENA, FOR EXAMPLE?

14 MR. WADE: I THINK YOU COULD ISSUE THAT ORDER OF THE
15 COURT, AND IN A SENSE WHAT THE GOVERNMENT, AS I WERE TO
16 UNDERSTAND THEIR PLEADING, IS ESSENTIALLY SAYING THAT THE
17 ASSISTANCE OF THE COURT AND THE AUTHORITY OF THE COURT IS
18 NECESSARY TO ENSURE FULL AND PROMPT COMPLIANCE.

19 THE COURT: HE DIDN'T SAY THAT.

20 MR. WADE: WELL, THEY SUGGESTED THAT A RULE 17
21 SUBPOENA --

22 THE COURT: -- MAY BE NECESSARY, RIGHT.

23 MR. WADE: -- MAY BE NECESSARY ISSUED FROM THE
24 GOVERNMENT TO THE AGENCIES, WHICH IS A PRETTY EXTRAORDINARY
25 ASSERTION OF THE KIND THAT I'VE NEVER SEEN BEFORE, YOUR HONOR.

10:14AM 1 BUT IF YOU STEP BACK AND FOCUS ON THE LEGAL ISSUE THAT IS
10:14AM 2 REALLY BEFORE THE COURT AS TO WHO HAS THIS OBLIGATION, THE
10:14AM 3 NINTH CIRCUIT LAW IS CLEAR THAT THAT OBLIGATION RESTS WITH THE
10:14AM 4 GOVERNMENT IN THIS CASE.

10:14AM 5 THE COURT: YOU KNOW, I'M TRYING TO -- YOU KNOW, I
10:14AM 6 APPRECIATE THAT. WHAT I'M SAYING IS HOW CAN I MOST EFFICIENTLY
10:14AM 7 GET THIS DONE FOR YOU?

10:14AM 8 I'M CURIOUS WHETHER OR NOT -- WE HAVE THIS CORRESPONDENCE
10:14AM 9 FROM MS. NORTON WHERE SHE INDICATES ON THE SECOND PAGE AS SHE
10:14AM 10 PREVIOUSLY CONVEYED IN HER JULY 9TH LETTER, FDA IS AND HAS BEEN
10:14AM 11 WORKING DILIGENTLY TO COLLECT, PROCESS, REVIEW, AND ULTIMATELY
10:14AM 12 PRODUCE ALL DOCUMENTS, AND I KNOW THERE WAS A QUESTION ABOUT
10:14AM 13 THAT, AND SHE SAYS IN THIS LETTER, AND THIS IS THE JULY 16TH,
10:15AM 14 LETTER, ALL DOCUMENTS RESPONSIVE TO ALL SIX CATEGORIES
10:15AM 15 REQUESTED BY THE PARTIES.

10:15AM 16 WHEN I LOOKED AT THIS LETTER, I WAS CURIOUS, DO YOU THINK
10:15AM 17 THIS OPENS THE DOOR FOR THIS COURT TO HAVE JURISDICTION OVER
10:15AM 18 HER TO HOLD HER TO HER WORD? IS THAT ENOUGH?

10:15AM 19 MR. WADE: I WOULD THINK AN ORDER THAT COMPELS THEM
10:15AM 20 TO PRODUCE THESE MATERIALS --

10:15AM 21 THE COURT: PURSUANT TO HER REPRESENTATION.

10:15AM 22 MR. WADE: -- PURSUANT TO HER REPRESENTATIONS WOULD
10:15AM 23 BE HONORED BY THE FDA.

10:15AM 24 I THINK AS A PRACTICAL MATTER AS OFFICERS BEFORE THE COURT
10:15AM 25 WE HAVE OBLIGATIONS TO THE COURT AND COUNSEL FOR THE GOVERNMENT

10:15AM 1 HAS DONE AN EXCELLENT JOB DISPATCHING THE OBLIGATIONS OF THE
10:15AM 2 UNITED STATES IN THIS CASE, AND SO WE WOULD SUGGEST THAT THE
10:15AM 3 ORDER REALLY BELONGS WITH THEM. THE OBLIGATION BELONGS WITH
10:15AM 4 THEM, AND THE ORDER SHOULD BE DIRECTED TO THEM.

10:15AM 5 I'M CONFIDENT THAT THE UNITED STATES WILL ADHERE TO AN
10:15AM 6 ORDER FROM THIS COURT, WHETHER THE BEST WAY TO FACILITATE
10:15AM 7 COMPLIANCE WITH THAT I THINK IS INVOLVING THE GOVERNMENT AND
10:16AM 8 THE AGENCIES AND THAT PROCESS. THAT WORKED WELL TO GET THEM
10:16AM 9 THE MATERIALS BEFORE, AND I THINK WHEN THE COURT ISSUES THAT
10:16AM 10 ORDER, IT WILL PROMPT THE APPROPRIATE RESOURCES NECESSARY TO
10:16AM 11 KEEP THIS ON TRACK AT ALL LEVELS.

10:16AM 12 BUT WHAT WE'VE HAD HERE, YOUR HONOR, IS THEY'VE HAD THIS
10:16AM 13 OBLIGATION SITTING WITH THEM FOR OVER A YEAR AND WE'VE SEEN
10:16AM 14 VERY LITTLE PROGRESS.

10:16AM 15 THE COURT: OKAY. YOU KNOW, LET'S --

10:16AM 16 MR. WADE: YOU DON'T WANT TO RELITIGATE THIS ISSUE.

10:16AM 17 THE COURT: YES. LET'S GO FORWARD. LET'S GO
10:16AM 18 FORWARD TO MAKE SOME PROGRESS HERE. NO, I APPRECIATE YOUR
10:16AM 19 CONCERNS ON THAT.

10:16AM 20 SO IF THE COURT WERE TO ISSUE AN ORDER TO THE FDA AND TO
10:16AM 21 MS. NORTON SOMEHOW, AND I'M ASKING YOUR ADVICE ON THIS, HOW
10:16AM 22 WOULD THAT READ? WHAT TYPE OF ORDER SHOULD BE ISSUED TO
10:16AM 23 MS. NORTON? PURSUANT TO HER JULY 16TH AND JULY 9TH LETTER, THE
10:16AM 24 COURT COULD ORDER HER TO PRODUCE. AND LET ME JUST SAY THIS, MY
10:17AM 25 SENSE IS THAT I AGREE SIX MONTHS IS TOO, TOO LONG.

1 MY THOUGHT WAS, COMING OUT HERE, WAS THAT I WOULD ORDER A
2 PRODUCTION WITHIN 60, 75 DAYS, AND THEN WE WOULD HEAR FROM THEM
3 PROBABLY WHY THEY CAN'T DO THAT. THAT'S MY GUESS OF HOW --
4 IT'S JUST A SUGGESTION OF HOW HUMAN NATURE SEEMS TO OPERATE.
5 WE'LL GIVE THEM A TIMELINE AND HOPEFULLY THEY CAN COMPLETE IT
6 IN 75 DAYS, 60 DAYS. SOMETHING LIKE THAT.

7 BUT WE'LL HEAR FROM THEM WHY THEY CAN'T IF THEY CAN'T.

8 MR. WADE: MIGHT I SUGGEST, YOUR HONOR, IF WE SET AN
9 EVIDENTIARY HEARING ON THIS MOTION FOR 60 DAYS HENCE, AND WE
10 HAVE THE AUTHORITY TO ISSUE A RULE 17 SUBPOENA OR THE COURT
11 ISSUES A SUBPOENA TO BRING THESE DOCUMENTS TO THAT HEARING, AND
12 WE HAVE THE WITNESSES PREPARED TO BE EXAMINED WITH RESPECT TO
13 THEIR COMPLIANCE WITH THAT ORDER OR SUBPOENA, EITHER ONE, IT
14 SEEMS THE GOVERNMENT IS WILLING TO ISSUE A SUBPOENA, THEY CAN
15 ISSUE A SUBPOENA FOR THOSE CATEGORIES OF DOCUMENTS.

16 THE COURT: YOU COULD HAVE DONE THAT.

17 MR. WADE: YEAH. WELL, I WOULD ANTICIPATE HAVING
18 SEEN THIS MOVIE, YOUR HONOR, THAT WERE WE TO ISSUE A RULE 17
19 SUBPOENA THEY WOULD QUASH IT UNDER NIXON OR SEEK TO QUASH IT
20 UNDER NIXON, AND THEN WE'D BE IN A DIFFERENT ARGUMENT.

21 THE REALITY IS THE OBLIGATION OF THE DISCLOSURE OF THE
22 UNITED STATES IN THIS CASE IS MUCH BROADER, AND THAT'S WHY RULE
23 17 IS NOT NECESSARILY THE APPROPRIATE MECHANISM FOR THAT.

24 THE COURT: I THINK WE'RE ALL OF COMMON PURPOSE TO
25 GET -- TO KEEP THE CASE MOVING SO WE CAN SECURE AND MAINTAIN

10:18AM 1 THE TRIAL DATE THAT MR. SCHENK, LAST TIME WE WERE TOGETHER, WAS
10:18AM 2 VERY EAGER TO PUT IN CONCRETE.

10:18AM 3 MR. WADE: AND THAT IS -- I KNOW WE HAVE AN AGREED
10:18AM 4 TO SCHEDULE. THAT'S A PRETTY PACKED SCHEDULE THAT IS BEFORE
10:18AM 5 THE COURT AS PART OF OUR STATUS REPORT.

10:18AM 6 MANY OF THOSE DATES ARE SORT OF TIED TO PROMPT COMPLIANCE
10:19AM 7 WITH DISCOVERY OBLIGATIONS, AND HAVING JUST PROPOSED THE ORDER
10:19AM 8 I HESITATE TO SAY IT'S GOING TO BE HARD TO MEET IT, BUT IF THE
10:19AM 9 AGENCIES ARE NOT ABLE TO MOVE WITH GREATER DISPATCH, THE WHOLE
10:19AM 10 CASCADING SERIES OF EVENTS IS IN JEOPARDY.

10:19AM 11 THE COURT: OH, I HAVE GREAT FAITH IN THE GOVERNMENT
10:19AM 12 AGENCIES.

10:19AM 13 MR. WADE: I DO, TOO, YOUR HONOR, WHEN GIVEN
10:19AM 14 ASSISTANCE AND DIRECTION FROM THE COURT.

10:19AM 15 THE COURT: SURE.

10:19AM 16 MR. WADE: A LOT HAS BEEN DONE HERE ALREADY.

10:19AM 17 THE COURT: LET ME ASK MR. BOSTIC. PARDON ME.

10:19AM 18 MR. BOSTIC, MY THOUGHT ABOUT WORRYING THE AGENCIES IN SOME
10:19AM 19 MANNER, ISSUING AN ORDER PURSUANT TO HER LETTER AND GIVING HER
10:19AM 20 75 DAYS TO PRODUCE THE DOCUMENTS, DO YOU HAVE ANY THOUGHTS ON
10:19AM 21 THAT, YOU OR YOUR TEAM?

10:19AM 22 MR. BOSTIC: SO, YOUR HONOR, I DON'T HAVE ANY
10:19AM 23 SPECIAL INSIGHT INTO HOW EFFECTIVE THAT ORDER WILL BE. I'M IN
10:19AM 24 THE SAME POSITION AS THE COURT AND THE DEFENSE. I HAVE EVERY
10:19AM 25 REASON TO BELIEVE THAT THE AGENCIES WILL DO THEIR BEST TO HONOR

1 ANY ORDER THAT THE COURT ISSUES AS THE GOVERNMENT HAS BEEN
2 DOING.

3 I AM INCLINED TO TAKE AT FACE VALUE THE REPRESENTATIONS
4 FROM THE AGENCIES THAT THEIR CURRENT TIME ESTIMATES ARE THE
5 BEST THAT THEY CAN DO GIVEN THE SCOPE OF THE REQUESTS AND WHAT
6 THEY HAVE IDENTIFIED AS THE BATCH OF DOCUMENTS THAT NEED TO BE
7 REVIEWED. I THINK THEY'RE PUTTING IN CONSIDERABLE EFFORTS TO
8 SPEED THAT UP. I THINK AN ORDER FROM THE COURT WOULD OBVIOUSLY
9 PROVIDE ADDITIONAL IMPETUS FOR THAT TO HAPPEN.

10 SO I WOULDN'T OBJECT OR THE GOVERNMENT WOULDN'T OBJECT TO
11 AN ORDER DIRECTED AT THE AGENCIES. I'M IN NO POSITION TO MAKE
12 THAT OBJECTION.

13 WHAT I WOULD OBJECT TO, RESPECTFULLY, YOUR HONOR, IS THE
14 ORDER THAT THE DEFENSE IS REQUESTING, WHICH WOULD BE DIRECTED
15 INSTEAD AT THE PROSECUTION IN THIS CASE RATHER THAN THOSE
16 AGENCIES, AND I THINK THE DEFENSE RIGHTLY POINTS OUT THAT THE
17 PROSECUTION HAS OBLIGATIONS UNDER RULE 16, BUT I THINK THE MORE
18 IMPORTANT QUESTION HERE IS WHAT IS THE EXTENT OF THOSE
19 OBLIGATIONS IN THIS SITUATION.

20 AND I THINK THE CASE LAW IS VERY CLEAR THAT THE
21 GOVERNMENT'S OBLIGATIONS UNDER RULE 16 AND UNDER BRADY ONLY GO
22 AS FAR AS THE GOVERNMENT'S ACCESS TO GETTING MATERIALS.

23 I THINK OVER THE LAST FEW WEEKS WE'VE HAD AMPLE
24 DEMONSTRATION AND PROOF THAT THE GOVERNMENT DOES NOT HAVE
25 COMPLETE ACCESS TO THE INFORMATION AND MATERIALS THAT THE

10:21AM 1 DEFENSE IS SEEKING.

10:21AM 2 WE'VE DONE EVERYTHING WE CAN, AND WE'RE EVEN CONSIDERING,
10:21AM 3 LIKE MR. WADE SAID, THE REMARKABLE STEP OF ISSUING A RULE 17
10:21AM 4 SUBPOENA.

10:21AM 5 BUT I SHOULD POINT OUT THAT ONCE WE'RE IN THAT TERRITORY,
10:21AM 6 ONCE WE'RE TALKING ABOUT THE PROSECUTION NEGOTIATING WITH THESE
10:21AM 7 AGENCIES AND TRYING TO PERSUADE THEM AND COORDINATING
10:21AM 8 REQUIREMENTS WITH OTHER PARTIES AND DISAGREEING WITH POSITIONS
10:21AM 9 TAKEN BY THE AGENCIES AND EVEN CONSIDERING RULE 17 SUBPOENAS,
10:21AM 10 WE'RE WELL BEYOND THE KIND OF ACCESS THAT IS CONTEMPLATED BY
10:21AM 11 EITHER BRADY OR RULE AND WE'RE IN NEW TERRITORY, AND THAT'S
10:21AM 12 WHAT THE SALYER CASE SAYS.

10:21AM 13 THE SALYER CASE SPECIFICALLY SAYS THAT THE NEED FOR FORMAL
10:22AM 14 PROCESS AND THE ACQUISITION OF DOCUMENTS IS THE ANTITHESIS OF
10:22AM 15 ACCESS AS DEFINED BY THE CASE LAW DISCUSSING THIS TOPIC.

10:22AM 16 SO I THINK IT'S IMPORTANT TO KEEP THAT IN MIND. THAT'S
10:22AM 17 THE REASON WHY ANY COURT ORDER IN THE GOVERNMENT'S OPINION
10:22AM 18 SHOULD NOT BE DIRECTED AT THE PROSECUTION, BUT IF THERE IS
10:22AM 19 GOING TO BE AN ORDER, IT WOULD BE MORE EFFECTIVELY DIRECTED AT
10:22AM 20 THE AGENCIES THEMSELVES.

10:22AM 21 THE COURT: THANK YOU.

10:22AM 22 SO I'M CONTEMPLATING ISSUING AN ORDER TO THE FDA. IT
10:22AM 23 SEEMS LIKE THE FDA IS REALLY THE AGENCY THAT HAS INDICATED
10:22AM 24 DIFFICULTY COMPLYING WITH ANY REQUEST. I'M NOT SAYING CMS HAS
10:22AM 25 NOT INDICATED DIFFICULTY AS WELL, BUT I AM CONTEMPLATING

10:22AM 1 ISSUING AN ORDER TO THE AGENCIES, MR. WADE, PURSUANT TO THEIR
10:22AM 2 REPRESENTATIONS IN THE LETTERS THAT THEY HAVE PROVIDED, THAT
10:22AM 3 THEY WILL PROVIDE THIS INFORMATION.

10:22AM 4 MY SENSE IS THAT I WOULD ORDER A PRODUCTION IN 75 DAYS,
10:22AM 5 AND WE'LL SEE WHAT DEVELOPS, AND THAT MAY GIVE US A FURTHER
10:23AM 6 TALKING POINT ABOUT THEIR TIMELINE.

10:23AM 7 MY SENSE IS, AND I'M JUST THINKING ABOUT THIS AS I SIT
10:23AM 8 HERE, THAT THE ORDER WOULD ALSO ORDER THEM TO KEEP IN
10:23AM 9 COMMUNICATION WITH THE GOVERNMENT AND PROVIDE THE GOVERNMENT
10:23AM 10 REGULAR UPDATES IN THAT TIME PERIOD ABOUT THE PRODUCTION.

10:23AM 11 MY CONCERN IS THIS: THAT I DON'T WANT ANYTHING TO COME UP
10:23AM 12 AND IMPEDE THE PROGRESS THAT HAS BEEN MADE. I KNOW THAT'S A
10:23AM 13 WORD THAT YOU PROBABLY WOULDN'T USE TO CHARACTERIZE HOW FAR WE
10:23AM 14 HAVE GONE HERE, MR. WADE.

10:23AM 15 BUT AGAIN, THIS COULD RAISE AN ISSUE WHERE THEIR LEGAL
10:23AM 16 TEAM, FDA, CMS MIGHT DECIDE TO COME IN AND DO A MOTION TO QUASH
10:23AM 17 THE COURT'S ORDER OR SOMETHING LIKE THAT. I HOPE THAT DOESN'T
10:23AM 18 HAPPEN. I HOPE THESE LETTERS TRULY EXPRESS THE FEELING OF
10:23AM 19 COOPERATION THAT THESE AGENCIES ARE GOING TO ACCOMPLISH AS THEY
10:24AM 20 SAID.

10:24AM 21 YOU'RE ON YOUR FEET, SIR.

10:24AM 22 MR. CAZARES: YOUR HONOR, COULD I ADDRESS THE ISSUE
10:24AM 23 BEFORE THIS CONTEMPLATED ORDER GETS ISSUED?

10:24AM 24 THE COURT: SURE. YOU WANT TO BE HEARD?

10:24AM 25 MR. CAZARES: YEAH, I WOULD LIKE TO BE HEARD. THANK

10:24AM 1 YOU.

10:24AM 2 THE COURT: SURE. OF COURSE.

10:24AM 3 MR. WADE: I HAVE A COUPLE OF POINTS TO ADDRESS AS
10:24AM 4 WELL, YOUR HONOR.

10:24AM 5 MR. CAZARES: OKAY.

10:24AM 6 MR. WADE: MAYBE WE'RE GOING TO GET TO THIS CMS
10:24AM 7 ORDER BECAUSE I THINK THE FDA OR THE CMS ISSUE, THE FDA IS MORE
10:24AM 8 TRANSPARENT IN EXPRESSING THAT THEY NEED SIX MONTHS OF TIME TO
10:24AM 9 ADDRESS THIS, AT LEAST SIX MONTHS OF TIME.

10:24AM 10 CMS IS SLIGHTLY MORE ARTFUL IN HOW THEY DRAFT THEIR
10:24AM 11 LETTER, BUT I THINK IF YOU LOOK AT THE RELEVANT PARAGRAPH IN
10:24AM 12 THE CMS LETTER, IN PARTICULAR IF YOU LOOK AT -- I'M LOOKING AT
10:24AM 13 EXHIBIT C TO THE STATUS CONFERENCE REPORT.

10:25AM 14 AND IF YOU LOOK AT THE LAST BULLET ON PAGE -- WELL, THE
10:25AM 15 LETTER IS NOT PAGINATED. IT'S PAGE -- I BELIEVE IT'S THE THIRD
10:25AM 16 PAGE, YOUR HONOR, THE LAST BULLET THAT STARTS "IN ADDITION TO
10:25AM 17 THE E-MAIL PREVIOUSLY COLLECTED."

10:25AM 18 THE COURT: RIGHT.

10:25AM 19 MR. WADE: IT'S DOCUMENT 89-3, PAGE 4 OF 6. THAT'S
10:25AM 20 THE HEADER THAT I HAVE ON MINE.

10:25AM 21 THE COURT: RIGHT. THAT'S THE ECF PAGE.

10:25AM 22 MR. WADE: YES. IF YOU LOOK AT THAT, THEY PROVIDE
10:25AM 23 NO ASSURANCES TO THE TIMING OF WHEN THEY'RE GOING TO PRODUCE
10:25AM 24 THESE MATERIALS AND IN FACT --

10:25AM 25 THE COURT: WELL, THEY SAY THE DATA WILL BE

10:25AM 1 IDENTIFIED AND LOADED IN THEIR REVIEW DATABASE IN AUGUST.

10:25AM 2 MR. WADE: THAT THEY WILL BE LOADED IN AUGUST.

10:25AM 3 THAT'S -- IN OTHER WORDS, YOUR HONOR, THAT'S WHEN THE REVIEW OF
10:25AM 4 THE DOCUMENTS WILL BE --

10:25AM 5 THE COURT: NO, I UNDERSTAND. AND THEN THEY SAY
10:26AM 6 THEY WILL THEN BE ABLE TO DETERMINE HOW LONG IT TAKES.

10:26AM 7 MR. WADE: RIGHT.

10:26AM 8 THE COURT: RIGHT.

10:26AM 9 MR. WADE: SO WHEN YOU LOOK AT THAT AND PARTICULARLY
10:26AM 10 WHEN COMBINED WITH THE LETTER OF TODAY WHICH WE RECEIVED JUST
10:26AM 11 BEFORE COURT BEGAN, OR AS COURT BEGAN, THAT SORT OF CREATES A
10:26AM 12 LITTLE MORE AMBIGUITY AS TO THE TIMING OF THE CMS DOCUMENTS AS
10:26AM 13 WELL. I'M GLAD WE HAD THAT AND IT WAS BROUGHT TO THE ATTENTION
10:26AM 14 OF THE COURT BEFORE ANY ACTION WAS TAKEN, BUT THERE'S NO MORE
10:26AM 15 ASSURANCE FROM CMS.

10:26AM 16 FDA WAS CANDID IN SAYING IT WILL BE SIX MONTHS OR MORE.
10:26AM 17 CMS WAS NOT SPECIFIC, BUT IT COULD BE SIX MONTHS OR MORE AT THE
10:26AM 18 RATE THAT THEY'VE --

10:26AM 19 THE COURT: WELL, I'M GOING TO SAY 75 DAYS.

10:26AM 20 MR. WADE: FOR CMS AS WELL, YOUR HONOR.

10:26AM 21 THE COURT: YES.

10:26AM 22 MR. WADE: OH, OKAY. I AM SORRY, I THOUGHT YOU WERE
10:26AM 23 SPEAKING JUST TO ISSUING AN ORDER WITH --

10:26AM 24 THE COURT: NO. WE'RE GOING TO START WITH 75 DAYS
10:26AM 25 WITH BOTH, AND THEN WE'LL SEE WHAT IS YIELDED.

10:27AM 1 MR. WADE: AND, YOUR HONOR, THAT APPROACH SOUNDS
10:27AM 2 SENSIBLE TO TRY AND LIGHT A FIRE, IF YOU WILL, AND MAKE SURE
10:27AM 3 THAT WE KEEP THINGS ON TRACK HERE. THAT HELPS DEAL WITH THE
10:27AM 4 WHEN, WHICH WAS PART -- ONE OF THE TWO INQUIRIES THE COURT
10:27AM 5 MADE, BUT IT DOESN'T NECESSARILY DEAL WITH THE WHAT, WHICH IS
10:27AM 6 ARE THEY PRODUCING ALL DOCUMENTS COVERED BY THESE REQUESTS?

10:27AM 7 THE CMS LETTER IN PARTICULAR, WHEN YOU LOOK AT THAT, AND
10:27AM 8 THAT WAS ESSENTIALLY CONFIRMED TO US IN OUR DEALINGS WITH THE
10:27AM 9 GOVERNMENT ON THIS, THEY ARE SAYING THAT THEY WILL PRODUCE
10:27AM 10 DOCUMENTS THAT ARE RESPONSIVE TO ALL REQUESTS BUT NOT ALL
10:27AM 11 DOCUMENTS THAT ARE RESPONSIVE TO THE REQUEST.

10:27AM 12 IN OTHER WORDS, YOUR HONOR, IF YOU WERE TO TELL ME TO
10:27AM 13 PRODUCE ALL OF THE FRUIT IN MY REFRIGERATOR AND I WERE TO
10:27AM 14 DESCRIBE MY REFRIGERATOR AND DESCRIBE THE COMPLEXITY AND THE
10:27AM 15 REGULATIONS OVER A NUMBER OF PAGES, AND THEN I WERE TO TELL
10:28AM 16 YOU, YOUR HONOR, TO COMPLY WITH THE ORDER I OPEN THE
10:28AM 17 REFRIGERATOR DOORS, I OPEN THE FRUIT, AND I OPEN THE BOTTOM
10:28AM 18 PRODUCE DRAWER, AND I PULL OUT THE APPLES AND THE ORANGES AND
10:28AM 19 I'VE GIVEN YOU THOSE, AND THEY'RE RESPONSIVE TO YOUR ORDER,
10:28AM 20 THAT'S SORT OF WHAT CMS HAS DONE.

10:28AM 21 WE DON'T KNOW IF THEY'RE STRAWBERRIES OR MAYBE THE BOWL
10:28AM 22 FULL OF CHERRIES ARE SITTING UP ON THE TOP SHELF BECAUSE THE
10:28AM 23 WAY THAT THEY'VE MADE REPRESENTATIONS TO THE COURT IS NOT
10:28AM 24 COMPREHENSIVE. IN FACT, IT SEEMS ARTFUL. IT'S VERY CAREFUL TO
10:28AM 25 SAY THAT THEY'RE NOT AGREEING TO PRODUCE ALL DOCUMENTS.

1 THAT'S HOW WE READ IT. WE HAD AN EXCHANGE WITH THE
2 GOVERNMENT IN CONNECTION WITH THIS -- THE PREPARATION OF THE
3 STATUS REPORT WHERE THE GOVERNMENT HAD INITIALLY SUGGESTED THAT
4 ALL DOCUMENTS WERE BEING PRODUCED, AND THEN UPON OUR RAISING
5 THE ISSUE THEY NOTED THAT THEY COULDN'T ACTUALLY MAKE THAT
6 REPRESENTATION BECAUSE CMS HAS NOT MADE THAT REPRESENTATION.

7 SO I HOPE THAT THE ORDER AS CONTEMPLATED BY THE COURT
8 WOULD INCLUDE ALL DOCUMENTS RESPONSIVE TO THE REQUESTS, NOT
9 SOME DOCUMENTS RESPONSIVE TO THE REQUEST, BECAUSE THERE ARE
10 SIGNIFICANT MATERIALS THAT ARE NOT COVERED BY THE DESCRIPTION
11 OF ACTIONS THAT THE CMS HAS LAID OUT THAT WE THINK ARE CRITICAL
12 TO THE DEFENSE.

13 I'D PREFER NOT TO GO THROUGH THEM LINE BY LINE. WE CAN
14 START THAT PROCESS, BUT I THINK A CLEAR ORDER AS TO IT BEING
15 ALL DOCUMENTS AND THAT THEY DON'T GET TO DECIDE THE PARAMETERS
16 WOULD GET US WHERE WE NEED TO GO, YOUR HONOR.

17 THE COURT: OKAY. THANK YOU.

18 ONE CONCERN I HAD ABOUT, AND I'M LOOKING AT THE
19 PROSECUTION HERE, I THINK THE FDA INDICATED THEY INTEND TO
20 PRODUCE ALL DOCUMENTS, BUT THEY WON'T PRODUCE DOCUMENTS THAT
21 HAVE BEEN PUBLICLY RELEASED IN SOME MANNER.

22 I UNDERSTAND, I THINK I UNDERSTAND THEIR THOUGHT PROCESS
23 THERE, BUT SHOULDN'T THERE BE SOME CATEGORIZATION OR SOME
24 NOTIFICATION OF WHAT THEY'RE NOT GIVING BECAUSE THEY BELIEVE
25 IT'S IN THE PUBLIC DOMAIN?

10:30AM 1 MR. BOSTIC: SO THE COURT, OF COURSE, IS FREE TO
10:30AM 2 ORDER THAT STEP. MY UNDERSTANDING OF THAT EXCLUSION IS THAT IT
10:30AM 3 WOULD COVER THINGS LIKE NEWSLETTER, E-MAILS, THINGS SENT TO
10:30AM 4 WIDE DISTRIBUTION LISTS, BLOOMBERG UPDATES, ASSOCIATED PRESS
10:30AM 5 BULLETINS, THINGS THAT ARE EASILY TARGETED AND ISOLATED FROM
10:30AM 6 THE PRODUCTION TO REDUCE THE LOAD ON THE AGENCY TO REVIEW THOSE
10:30AM 7 DOCUMENTS.

10:30AM 8 THE AGENCY WAS CAREFUL TO SAY THAT THEY WOULD STILL
10:30AM 9 PRODUCE ANY SUCH DOCUMENT THAT INCLUDED COMMENTARY FROM AN FDA
10:30AM 10 EMPLOYEE. SO, FOR EXAMPLE, IF THERE IS A RELEVANT NEWS ARTICLE
10:30AM 11 AND AN FDA EMPLOYEE FORWARDS IT TO ANOTHER, THAT WOULD STILL BE
10:30AM 12 PRESERVED, REVIEWED, AND TURNED OVER TO THE DEFENSE. IT'S ONLY
10:30AM 13 THE PUBLIC BULLETIN, IT'S THE MASS E-MAILS THAT SHOULDN'T
10:30AM 14 REALLY BE OF ANY VALUE IN THIS CASE.

10:31AM 15 THE COURT: SURE.

10:31AM 16 MR. BOSTIC: AND THAT AS WE ALL KNOW TAKES UP A
10:31AM 17 LARGE VOLUME OF ANYONE'S INBOX THAT THE AGENCY IS SEEKING TO
10:31AM 18 AVOID HAVING TO REVIEW AND PRODUCE. AGAIN, ALL WITH THE AIM OF
10:31AM 19 SPEEDING UP THIS ROSTER AND GETTING THE DOCUMENTS TO THE
10:31AM 20 DEFENSE.

10:31AM 21 THE COURT: WELL, I AGREE WITH THAT, AND I'M JUST
10:31AM 22 CURIOUS IF THERE ARE SOME -- IF THEY CAN IDENTIFY, IF THE FDA
10:31AM 23 CAN IDENTIFY WHAT IT IS, THE DOCUMENT IS, AND JUST KEEP A LOG
10:31AM 24 OF THAT SUCH THAT IT'S AVAILABLE FOR THE DEFENSE OR BOTH SIDES
10:31AM 25 IF THEY -- IF YOU WANT TO LOOK AT IT.

10:31AM 1 MR. WADE: THERE'S A GOOD EXAMPLE, YOUR HONOR. ONE
10:31AM 2 OF THE PARTICULAR ISSUES THAT WE WERE CONTEMPLATING -- BECAUSE,
10:31AM 3 OF COURSE, IF IT'S JUST SPAM, WE DON'T CARE, IF IT HAPPENS TO
10:31AM 4 MENTION SOMETHING AND NO ONE FOCUSES ON IT.

10:31AM 5 BUT THE WAY THAT THEY'VE TALKED ABOUT LIMITING IT TO THOSE
10:31AM 6 MATERIALS WHERE THERE'S COMMENTARY MAYBE IT'S NOT QUITE
10:31AM 7 SUFFICIENT BECAUSE IF YOU THINK ABOUT IT, IF THERE'S A
10:31AM 8 SIGNIFICANT MEDIA ARTICLE THAT RELATED TO THE COMPANY IN THIS
10:31AM 9 CASE AND THAT WAS FORWARDED AROUND WITHOUT COMMENTS TO KEY
10:32AM 10 DECISION MAKERS OR KEY POLICY MAKERS AT A PARTICULAR TIME, THAT
10:32AM 11 COULD BE A SIGNIFICANT FACTOR IN THE CASE.

10:32AM 12 SO AGAIN --

10:32AM 13 THE COURT: WELL, CAPTURING THE LOG OF THAT, WHAT
10:32AM 14 THEY HAVEN'T SENT.

10:32AM 15 MR. WADE: I THINK THAT WOULD ADDRESS THAT
10:32AM 16 PARTICULAR POINT, YOUR HONOR.

10:32AM 17 THE COURT: IT SEEMS LIKE IT WOULD.

10:32AM 18 MR. WADE: YEAH.

10:32AM 19 MR. BOSTIC: AND BECAUSE AS I UNDERSTAND IT THIS
10:32AM 20 PROPOSITION, THIS PROPOSAL FROM THE AGENCY WAS DESIGNED TO
10:32AM 21 STREAMLINE THINGS AND SPEED THINGS UP, THEY MAY REACT TO THAT
10:32AM 22 REQUIREMENT BY SIMPLY PRODUCING THOSE MATERIALS RATHER THAN
10:32AM 23 LOGGING THEM IF THAT'S ACCEPTABLE TO THE COURT.

10:32AM 24 THE COURT: OF COURSE.

10:32AM 25 MR. WADE: AS WE HAVE SAID THROUGHOUT, YOUR HONOR,

1 OUR GOAL IN IDENTIFYING SPECIFIC CATEGORIES WAS TO EASE THE
2 BURDEN, NOT INCREASE THE BURDEN.

3 WE UNDERSTAND THE GOVERNMENT HAS TOOK STEPS YEARS AGO TO
4 PRESERVE ALL DOCUMENTS THAT RELATE TO THERANOS WITHIN THESE
5 AGENCIES.

6 IF IT'S EASIER TO PRODUCE ALL DOCUMENTS RELATING TO
7 THERANOS AND AVOID ALL OF THIS REVIEW, WE'RE HAPPY TO TAKE ALL
8 OF THEM, YOUR HONOR, AND DO THE WORK FOR THEM.

9 WE WANT WHAT THE COURT WANTS. WE WANT A PROMPT
10 PRODUCTION.

11 SO IF ANY OF THESE PARTICULARS ARE HOLDING THINGS UP, THEY
12 SHOULD ERR ON THE SIDE OF GIVING US EVERYTHING AND WE'LL DO THE
13 WORK.

14 MR. BOSTIC: YOUR HONOR, IF I COULD ADDRESS THIS
15 ISSUE ABOUT ALL DOCUMENTS AND WHAT THAT MEANS HERE. I THINK
16 IT'S VERY EASY FOR THE DEFENSE TO SEND REQUESTS THAT REQUIRE
17 THE PRODUCTION OF ALL DOCUMENTS. IT'S EQUALLY EASY FOR THE
18 PROSECUTION TO PASS THOSE REQUESTS ON TO THESE AGENCIES, BUT
19 FOR A LARGE ORGANIZATION RECEIVING REQUESTS LIKE THIS AND
20 HAVING TO COMPLY WITH THEM IS A MORE COMPLICATED PROCESS, AND
21 THAT'S TRUE NOT JUST FOR AGENCIES BUT FOR LARGE CORPORATIONS AS
22 EVERYONE IN THIS COURTROOM KNOWS.

23 WHEN LARGE ORGANIZATIONS RECEIVE REQUESTS LIKE THIS,
24 THEY'RE REQUIRED TO, AS A FIRST STEP, FIGURE OUT WHERE THE
25 RESPONSIVE DOCUMENTS ARE LIKELY TO BE, WHO ARE THE MOST

1 RELEVANT CUSTODIANS, WHAT ARE THE DATE LIMITATIONS, HOW CAN WE
2 FIND THESE DOCUMENTS SO THAT WE CAN THEN REVIEW AND PRODUCE
3 THEM.

4 BEAR WITH ME, I HAVE A COUPLE OF FIGURES THAT I JUST
5 GATHERED FROM INTERNET SEARCHING THAT THE FDA, ACCORDING TO MY
6 INFORMATION, HAS 17,000 EMPLOYEES IN THE CENTER FOR DEVICES,
7 AND RADIOLOGICAL HEALTH THERE ARE 1800, AND IN THE OFFICE OF
8 REGULATORY AFFAIRS THERE ARE 4900.

9 JUST IN THOSE SUBGROUPS IF EVERY ONE OF THOSE EMPLOYEES
10 RECEIVES, SAY, 25 E-MAILS PER DAY, WE'RE TALKING ABOUT 160,000
11 E-MAILS PER DAY, AND THAT MEANS MORE THAN 40 MILLION E-MAILS
12 PER YEAR. SO JUST IN THAT GROUP WE'RE TALKING 40 MILLION
13 E-MAILS PER YEAR. THAT'S THE VOLUME, THAT'S THE UNIVERSE OF
14 DOCUMENTS THAT THE AGENCY HAS TO SEARCH AND PRODUCE TO RESPOND
15 TO REQUESTS LIKE THESE.

16 SO I THINK AS ANY ORGANIZATION WOULD, THEY IDENTIFY
17 CUSTODIANS, THEY'RE BEING TRANSPARENT ABOUT WHICH CUSTODIANS
18 THEY'RE SEARCHING.

19 I UNDERSTAND THE DEFENSE HAS COMPLAINTS ABOUT THE SCOPE OF
20 THAT SEARCH. I THINK RECENTLY MR. CAZARES SENT A LETTER TO FDA
21 COUNSEL DISCUSSING SOME OF THOSE POINTS, SOME OF THOSE STEPS
22 THAT THE AGENCY HAS TAKEN.

23 I THINK THAT HAS BEEN THE ONLY COMMUNICATION BETWEEN THE
24 DEFENSE AND THE AGENCIES RELATING TO THESE REQUESTS IN THE
25 CRIMINAL CASE, BUT I THINK THAT IS THE BEST WAY TO ADDRESS

10:35AM 1 THESE ISSUES.

10:35AM 2 IF THE DEFENSE HAS COMPLAINTS OR CONCERNS ABOUT THE STEPS
10:35AM 3 THAT THE AGENCIES ARE TAKING TO NARROW THE UNIVERSE OF WHAT
10:35AM 4 THEY NEED TO REVIEW SO THAT THEY'RE NOT LOOKING AT 40 MILLION
10:35AM 5 E-MAILS PER YEAR, THEN I THINK THOSE CONVERSATIONS SHOULD TAKE
10:35AM 6 PLACE BETWEEN THE DEFENSE AND THE AGENCIES.

10:35AM 7 MR. WADE: YOUR HONOR, WE UNDERSTAND THE GOVERNMENT
10:35AM 8 IS LARGE AND THAT A LOT OF PEOPLE HAVE E-MAIL AND SEND E-MAIL.

10:35AM 9 WE ALSO UNDERSTAND THAT THERE ARE SOME ARBITRARY CUTOFFS
10:35AM 10 THAT ARE PUT IN THE REPRESENTATIONS OF THE GOVERNMENT THAT
10:35AM 11 CLEARLY MISS THE MARK IN TERMS OF GATHERING ALL DOCUMENTS.
10:35AM 12 I'LL GIVE THE COURT ONE EXAMPLE.

10:35AM 13 THEY TALK ABOUT HOW THEIR MEDIA INTERACTIONS, THE MEDIA
10:36AM 14 INTERACTIONS AT CMS TOGETHER WITH THE DOCUMENTS RESPONSIVE TO
10:36AM 15 THAT REQUEST, THEY HAVE A FORMAL OFFICE OF COMMUNICATIONS OF
10:36AM 16 CMS, THE COMPONENT OF CMS THAT ISSUES PRESS RELEASES AND DEALS
10:36AM 17 WITH FORMAL MEETING INQUIRIES.

10:36AM 18 IT'S CLEAR TO EVERYONE HERE, YOUR HONOR, THAT THERE WERE
10:36AM 19 LEAKS THAT WERE COMING OUT OF CMS OF INFORMATION RELATING TO
10:36AM 20 THERANOS AND INTERACTIONS WITH PEOPLE OF AUTHORITY WITHIN THE
10:36AM 21 AGENCY DEALING WITH SOME OF THE REPORTERS IN THIS CASE.

10:36AM 22 THAT'S NOT GOING TO BE FOUND IN SOME FORMAL INQUIRY TO THE
10:36AM 23 OFFICE OF COMMUNICATIONS. IT'S GOING TO BE FOUND WITHIN THE
10:36AM 24 AGENCY WITH THE PEOPLE WHO ARE INTERACTING WITH THERANOS OR WHO
10:36AM 25 ARE KNOWLEDGEABLE ABOUT THERANOS, OR SENIOR PEOPLE WITHIN CMS

10:36AM 1 WHO HAVE THAT KNOWLEDGE AND MAY BE DEALING WITH REPORTERS.

10:36AM 2 SO TO SAY THAT THE WAY THAT WE'RE GOING TO RESPOND TO THIS
10:37AM 3 REQUEST, WHICH THEY CLEARLY UNDERSTAND BECAUSE THEY HAVE ALL OF
10:37AM 4 OUR PLEADINGS, THEY'RE A MATTER OF PUBLIC RECORD AND THEY'VE
10:37AM 5 BEEN DEALING WITH THE GOVERNMENT, WHAT WE'RE LOOKING FOR TO TRY
10:37AM 6 AND DO THAT BY GOING TO THE ONE FORMAL PRESS RELEASE MACHINE IS
10:37AM 7 JUST NOT SOMETHING THAT IS DONE IN GOOD FAITH.

10:37AM 8 BUT I THINK THAT THE WAY TO ADDRESS THIS CONSISTENT WITH
10:37AM 9 THE APPROACH THAT IS ADVOCATED BY THE COURT IS NOT TO IMPOSE
10:37AM 10 AN -- YOU KNOW, A FURTHER BURDEN ON THE GOVERNMENT.

10:37AM 11 MR. CAZARES WHEN HE STANDS CAN SPEAK TO THE IMPENETRABLE
10:37AM 12 COMMUNICATIONS THAT HE'S BEEN HAVING WITH THESE AGENCIES FOR
10:37AM 13 NINE MONTHS, TEN MONTHS NOW AND IT'S GOTTEN US TO EXACTLY THE
10:37AM 14 SAME PLACE THAT WE'RE IN HERE.

10:37AM 15 I THINK THE BEST WAY TO ENSURE THAT THERE'S GOOD FAITH
10:37AM 16 COMPLIANCE WITH IT IS THAT AT THE END OF 75 DAYS WE HAVE A
10:37AM 17 HEARING AND WE ASK THOSE PEOPLE WHO ARE GATHERING DOCUMENTS TO
10:37AM 18 BE HERE TO EXPLAIN WHAT THEY DID TO GATHER THE DOCUMENTS.

10:37AM 19 I WILL SAY THAT AS SOMEONE WHO HAS REPRESENTED A LOT OF
10:38AM 20 CORPORATIONS WHO HAS RECEIVED SUBPOENAS OF THE KIND THAT
10:38AM 21 MR. BOSTIC OR REQUESTS OF THE KIND THAT MR. BOSTIC REFERS TO,
10:38AM 22 IF I WERE EVER TO COMPLY WITH THE REQUEST IN RESPONSE TO A
10:38AM 23 GRAND JURY SUBPOENA IN THE WAY THAT THE GOVERNMENT HAS HERE AND
10:38AM 24 THAT -- AND AN ENFORCEMENT ORDER IS BROUGHT BEFORE THE COURT, I
10:38AM 25 MIGHT GO OUT THE SIDE DOOR RATHER THAN THE BACK DOOR WHEN WE'RE

10:38AM 1 DONE. IT'S NOT TRANSPARENT. IT'S NOT -- IT'S VERY OPAQUE, AND
10:38AM 2 IT'S CLEARLY NOT COMPREHENSIVE AS CURRENTLY FRAMED BY THE
10:38AM 3 AGENCY.

10:38AM 4 WE'RE JUST WANTING TO AVOID HAVING TO SPEND ANOTHER SIX
10:38AM 5 MONTHS LITIGATING THIS, ALL OF THE EFFORT WHICH WILL DETRACT
10:38AM 6 FROM OUR ABILITY TO PREPARE THE CASE FOR TRIAL, AND KEEP ON THE
10:38AM 7 SCHEDULE THAT IS A TOUGH SCHEDULE FOR THE DEFENSE.

10:38AM 8 THE COURT: OKAY. THANK YOU.

10:38AM 9 MR. CAZARES: THANK YOU, YOUR HONOR.

10:38AM 10 STEPHEN CAZARES FOR MR. BALWANI.

10:38AM 11 YOUR HONOR, THERE ARE A COUPLE OF ISSUES WITH THE PROPOSED
10:39AM 12 ORDER AND FRAMEWORK THAT I THINK THE COURT WANTS TO PROCEED
10:39AM 13 WITH, AND IT RAISES REALLY TWO ISSUES: EFFICIENCY AND
10:39AM 14 ACCOUNTABILITY.

10:39AM 15 I THINK THAT FIRST ISSUE THE FRAMEWORK AND THE PROPOSED
10:39AM 16 ORDER TO THE AGENCIES TO HAVE THEM CONTINUE TO MAYBE FACILITATE
10:39AM 17 THE PRODUCTION THAT THEY'RE REFERENCING IN THEIR LETTERS THAT
10:39AM 18 MAY OR MAY NOT BE 100 PERCENT RESPONSIVE TO THE REQUESTS IN THE
10:39AM 19 MOTION TO COMPEL, THAT APPEARS ANYWAY TO MAYBE ADVANCE THE
10:39AM 20 EFFICIENCY ISSUE.

10:39AM 21 IT MAYBE WILL PROD THE AGENCIES FORWARD TO ADDRESS THE
10:39AM 22 DOCUMENTS REVIEW MORE QUICKLY, WHICH THE FDA IS NOW SAYING SIX
10:39AM 23 MONTHS DOING A PAGE BY PAGE AND IN SOME WAYS MANUAL REVIEW
10:39AM 24 BECAUSE THEY SAY THEY DON'T HAVE TECHNICAL CAPABILITIES.

10:39AM 25 THE COURT: I'VE READ THAT.

10:39AM 1 MR. CAZARES: I KNOW THAT, YOUR HONOR.

10:39AM 2 SO WHAT A RULE 16 ORDER DOES THAT AN ORDER FROM THIS COURT
10:39AM 3 THAT ISN'T TIED TO THE FEDERAL RULES OF CIVIL PROCEDURE OR THE
10:40AM 4 CIVIL RULES OF CRIMINAL -- FEDERAL RULES OF CIVIL PROCEDURE OR
10:40AM 5 THE FEDERAL RULES OF CRIMINAL PROCEDURE IS WHAT IS THE
10:40AM 6 ACCOUNTABILITY TO THAT ORDER OTHER THAN OBVIOUSLY THE OFFICERS
10:40AM 7 BEFORE THIS COURT, THE AUSA'S, DEFENSE COUNSEL, MAYBE COUNSEL
10:40AM 8 TO THE AGENCIES, WHAT IS THE ACCOUNTABILITY AND WHO IS
10:40AM 9 RESPONSIBLE FOR THE OUTPUT OF THAT DOCUMENT PRODUCTION?

10:40AM 10 THE WAY THIS IS BEING FRAMED RIGHT NOW THE DEFENSE AND THE
10:40AM 11 FDA AND CMS ARE ENGAGED IN THIS BACK AND FORTH THAT WE, FOR
10:40AM 12 MR. BALWANI, HAVE BEEN ENGAGED WITH THE AGENCIES NOW FOR
10:40AM 13 11 MONTHS. IT WAS TEN MONTHS BEFORE. WE'RE ALMOST 11 MONTHS
10:40AM 14 IN NOW IN TRYING TO GET DOCUMENTS OUT OF THE TWO AGENCIES.

10:40AM 15 HERE IN THE CRIMINAL CASE THE OTHER PARTY TO THE CASE, THE
10:40AM 16 DEPARTMENT OF JUSTICE, IS ESSENTIALLY STANDING BACK LIKE A
10:40AM 17 THIRD PARTY FACILITATING LETTERS AND RESPONSES BACK BETWEEN THE
10:40AM 18 TWO PARTIES.

10:40AM 19 BUT THE WAY IT'S FRAMED RIGHT NOW, EVEN WITH AN ORDER BY
10:40AM 20 THIS COURT TO THOSE AGENCIES, THE DEPARTMENT OF JUSTICE ISN'T
10:41AM 21 RESPONSIBLE FOR THE OUTPUT OF THOSE PRODUCTIONS.

10:41AM 22 TO THE EXTENT THAT THOSE AGENCIES FAIL TO PRODUCE
10:41AM 23 SOMETHING, RIGHT NOW THIS COURT IS NOT MAKING A FINDING THAT
10:41AM 24 THE GOVERNMENT HAS KNOWLEDGE AND ACCESS TO THOSE DOCUMENTS --

10:41AM 25 THE COURT: IF THEY DON'T, IF THEY DON'T,

10:41AM 1 MR. CAZARES, IF THEY DON'T THEY WILL STAND AT THE LECTERN WHERE
10:41AM 2 YOU ARE AND THEY'LL TELL ME WHY, WON'T THEY?

10:41AM 3 MR. CAZARES: I HOPE SO, YOUR HONOR.

10:41AM 4 THE COURT: RIGHT. RIGHT.

10:41AM 5 MR. CAZARES: BUT THAT ASSUMES THAT WE CAN FIND WHAT
10:41AM 6 WAS MISSING. I MEAN, THAT'S THE PROBLEM. WHEN UNDER RULE 16
10:41AM 7 ORDER, BECAUSE THE GOVERNMENT IN THE PAST HAS GOTTEN 300,000
10:41AM 8 DOCUMENTS FROM THESE 2 AGENCIES AND INTERVIEWED 17 WITNESSES,
10:41AM 9 AND THE COURT FINDS THAT THEY HAVE ACCESS TO THE DOCUMENTS,
10:41AM 10 THEY HAVE THE RESPONSIBILITY TO MAKE SURE THAT EVERYTHING THAT
10:41AM 11 IS RESPONSIVE TO THE REQUEST THAT THE DEFENSE IS ENTITLED TO
10:41AM 12 UNDER RULE 16 GETS PRODUCED. NOT THE AGENCIES. NOT MS. NORTON
10:41AM 13 AND THE ATTORNEYS FOR THE AGENCIES.

10:41AM 14 THE GOVERNMENT HAS THE RESPONSIBILITY TO INTERACT WITH THE
10:41AM 15 AGENCIES, MAYBE PROVIDE THE DEPARTMENT OF JUSTICE RESOURCES
10:42AM 16 POST LITIGATION, THERE ARE BUDGETS TO FACILITATE MAYBE THIS
10:42AM 17 REVIEW THAT THE FDA IS HAVING SO MUCH DIFFICULTY DOING BECAUSE
10:42AM 18 THEY DON'T HAVE THE TECHNICAL CAPABILITIES.

10:42AM 19 THE DEPARTMENT OF JUSTICE DOES. THEY ALSO HAVE HIRED
10:42AM 20 EXPERTS. MY GUESS IS WHEN WE DO THIS TRIAL THERE WILL BE AN
10:42AM 21 EXPERT WITNESS OR TWO PAID BY THE DEPARTMENT OF JUSTICE TO HELP
10:42AM 22 FACILITATE THE PRESENTATION OF THEIR CASE. THEY CAN DO THE
10:42AM 23 SAME TO HELP FACILITATE THIS DOCUMENT PRODUCTION, AND I THINK A
10:42AM 24 RULE 16 ORDER WOULD FACILITATE THAT BECAUSE IT WOULD BE
10:42AM 25 INCUMBENT UPON THEM TO GET THE DOCUMENTS AND PRODUCE THEM.

10:42AM 1 THAT'S THE ISSUE, YOUR HONOR. IT'S NOT THE EFFICIENCY ISSUE.

10:42AM 2 BUT ON THE ACCOUNTABILITY SIDE, I STILL DON'T SEE HOW THE
10:42AM 3 AGENCIES ARE RESPONSIBLE FOR MAKING SURE THAT WE ON THE DEFENSE
10:42AM 4 SIDE GET ALL DOCUMENTS THAT ARE SUBJECT TO RULE 16 THAT ARE
10:42AM 5 HELPFUL TO THE DEFENSE.

10:42AM 6 HOW ARE THEY EVEN IN A POSITION TO KIND OF WEIGH THAT?
10:42AM 7 SOME OF THE ITEMS THAT THEY ARE CONCERNED ABOUT REDACTING OF
10:42AM 8 THIRD PARTY TRADE SECRET AND CONFIDENTIAL COMMERCIAL
10:42AM 9 INFORMATION, TO THE EXTENT THAT THAT IS EMBEDDED IN, LET'S SAY,
10:43AM 10 INTERNAL COMMUNICATIONS RELATING TO THERANOS AND THE DEFENSE
10:43AM 11 HERE, MAYBE THAT'S A DIFFERENT CONTEXT AND MAYBE THAT'S
10:43AM 12 IMPORTANT TO OUR ANALYSIS OF WHAT IS SAID ABOUT THERANOS AND
10:43AM 13 THE REGULATIONS BY THE AGENCIES OF THE DEVICES AND THE
10:43AM 14 LABORATORIES.

10:43AM 15 IT'S NOT CLEAR TO ME THAT REPRESENTATIVES OF THE AGENCIES,
10:43AM 16 MAYBE PARALEGALS THERE, WHO ARE DOING THESE REVIEWS ARE IN A
10:43AM 17 POSITION TO REALLY MEASURE THAT.

10:43AM 18 THE DEPARTMENT OF JUSTICE IS AT LEAST IN A BETTER POSITION
10:43AM 19 TO DO THAT. THAT'S AGAIN WHY RULE 16 PLACES THE IMPETUS ON
10:43AM 20 THEM, NOT ON THE CUSTODIANS WHO HAVE THESE DOCUMENTS. THAT'S
10:43AM 21 BRYAN AND THAT'S SANTIAGO, YOUR HONOR.

10:43AM 22 I MEAN, THOSE AGENCIES -- AND IN THE GRACE CASE, THE THIRD
10:43AM 23 PARTY AGENCY, THE EPA, NOT THE DEPARTMENT OF JUSTICE CRIMINAL
10:43AM 24 AGENCY. IT'S A THIRD PARTY REGULATORY AGENCY THAT WAS A PART
10:43AM 25 OF THE INVESTIGATION AND THAT COURT ISSUED THE ORDER AND

10:43AM 1 REQUIRED THE GOVERNMENT TO GET THE DOCUMENTS FROM THE EPA.

10:43AM 2 I WOULD HOPE THAT THE COURT WOULD DO SO HERE TODAY AND IF
10:43AM 3 IT DOESN'T, I JUST HOPE THAT WE'RE NOT BACK HERE IN TWO OR
10:44AM 4 THREE MONTHS HAVING TO RELITIGATE ALL OF THIS, YOUR HONOR.

10:44AM 5 THE COURT: OKAY. THANK YOU.

10:44AM 6 MR. BOSTIC: YOUR HONOR, MAY I RESPOND TO A COUPLE
10:44AM 7 OF HIS POINTS?

10:44AM 8 THE COURT: YES.

10:44AM 9 MR. BOSTIC: SO I CAN TELL THE DEFENSE, AND
10:44AM 10 CERTAINLY FOR MR. BALWANI, WANTS THE COURT'S ORDER TO BE
10:44AM 11 DIRECTED AT THE PROSECUTION.

10:44AM 12 THAT ORDER, THOUGH, WOULD COMPEL THE GOVERNMENT TO TAKE
10:44AM 13 THE STEPS THAT IT HAS ALREADY BEEN TAKING, THE STEPS THAT HAVE
10:44AM 14 ALREADY ACHIEVED SOME SUCCESS IN RETRIEVING THESE DOCUMENTS
10:44AM 15 FROM THE AGENCIES, BUT NOT COMPLETE SUCCESS, AND THAT'S THE
10:44AM 16 PROBLEM.

10:44AM 17 I THINK THE FACT THAT THE GOVERNMENT, AND BY THE
10:44AM 18 GOVERNMENT I MEAN THE PROSECUTION HERE, HAS DONE EVERYTHING IT
10:44AM 19 CAN DO IS NOT IN DISPUTE.

10:44AM 20 DEFENSE COUNSEL HAS REPEATEDLY SAID THEY BELIEVE THE
10:44AM 21 PROSECUTION IS ACTING IN GOOD FAITH ON THIS ISSUE. THEIR
10:44AM 22 SECTION OF THE JOINT STATUS MEMO SAID THAT DESPITE THE
10:44AM 23 GOVERNMENT 'S EFFORTS, QUOTE, "THE GOVERNMENT HAS BEEN UNABLE
10:44AM 24 TO OBTAIN ASSURANCE FROM THE AGENCIES THAT THEY WILL PRODUCE
10:44AM 25 ALL DOCUMENTS." WE'VE TALKED ABOUT WHAT THAT "ALL DOCUMENTS"

10:45AM 1 PHRASE MEANS AND SHOULD MEAN.

10:45AM 2 BUT THE POINT HERE IS THAT THE GOVERNMENT HAS TRIED AND
10:45AM 3 HAS BEEN UNABLE TO ACHIEVE MORE THAN IT HAS ACHIEVED.

10:45AM 4 SO THAT'S WHY I THINK THAT WE ARE BEYOND THE RULE 16 SCOPE
10:45AM 5 IN THIS CASE, BECAUSE, AGAIN, THOSE OBLIGATIONS DO REST WITH
10:45AM 6 THE GOVERNMENT, BUT THEY ONLY COVER DOCUMENTS THAT THE
10:45AM 7 GOVERNMENT HAS ACCESS TO, AND WE'VE SHOWN THE EXTENT OF THAT
10:45AM 8 ACCESS HERE.

10:45AM 9 IT'S ONLY FAIR TO APPLY THAT RULE AND TO IMPOSE THAT
10:45AM 10 ACCOUNTABILITY ON THE GOVERNMENT IF THE GOVERNMENT DOES HAVE
10:45AM 11 ACCESS TO THE DOCUMENTS.

10:45AM 12 OF COURSE THAT SHOULD GO WITHOUT SAYING.

10:45AM 13 THE MOST DIRECT APPROACH IT WOULD SEEM IS TO DIRECT AN
10:45AM 14 ORDER AT THE AGENCIES THEMSELVES, THE CUSTODIANS WHO CONTROL
10:45AM 15 THOSE DOCUMENTS WHO CONTROL THEIR OWN POSITIONS ABOUT WHAT
10:45AM 16 THEY'RE GOING TO DO IN RESPONSE TO THESE REQUESTS.

10:45AM 17 DIRECTING THAT ORDER AT THE GOVERNMENT IS NOT MORE
10:45AM 18 EFFICIENT. IT'S LESS DIRECT. IT DOES SET UP A POTENTIAL
10:45AM 19 PITFALL FOR THE GOVERNMENT THAT I THINK THE DEFENSE HAS
10:46AM 20 IDENTIFIED WHICH IS THAT IF AND WHEN THE AGENCIES FAIL TO
10:46AM 21 PRODUCE A CERTAIN DOCUMENT OR TWO THE GOVERNMENT CAN THEN BE
10:46AM 22 BLAMED FOR THAT, THE PROSECUTION CAN BE BLAMED FOR THAT. AND I
10:46AM 23 THINK THAT SITUATION CONFERS AN ADVANTAGE ON THE DEFENSE, BUT I
10:46AM 24 DON'T THINK IT'S AN ADVANTAGE THAT THE COURT SHOULD CONFER
10:46AM 25 BECAUSE I DON'T THINK THAT'S A FAIR SITUATION TO PUT US IN.

10:46AM 1 THE COURT: THANKS. LET ME ASK, MR. BOSTIC, JUSTICE
10:46AM 2 HAS A -- I THINK IN NORTH CAROLINA IS THERE A REPOSITORY FOR
10:46AM 3 MASS RELEASE FOR LARGE VOLUMES OF DISCOVERY?

10:46AM 4 MR. BOSTIC: THERE'S A PROCESSING CENTER, YES.

10:46AM 5 THE COURT: AND IS THAT SOMETHING THAT THE JUSTICE
10:46AM 6 WOULD MAKE AVAILABLE TO THESE AGENCIES? IS THAT SOMETHING THAT
10:46AM 7 WOULD ASSIST THIS PROCESS?

10:46AM 8 MR. BOSTIC: IN FACT, YOUR HONOR, AS I UNDERSTAND IT
10:46AM 9 CMS, I BELIEVE, IS ALREADY BEING AFFORDED THE USE OF THAT
10:46AM 10 FACILITY. SO THE CMS DOCUMENTS ARE BEING HOSTED AND PROCESSED
10:46AM 11 FROM THE DEPARTMENT OF JUSTICE'S LITIGATION TECHNOLOGY SUPPORT
10:47AM 12 CENTER.

10:47AM 13 SO, YES, THAT RESOURCE IS AVAILABLE.

10:47AM 14 THE COURT: AND THAT'S AVAILABLE TO THE FDA AS WELL?

10:47AM 15 MR. BOSTIC: I BELIEVE THE FDA HAS ITS OWN
10:47AM 16 EQUIVALENT PROCESSING SYSTEM. SO MY UNDERSTANDING FROM THEM IS
10:47AM 17 THAT THEY HAVE NO NEED OF IT, BUT I WOULD BE HAPPY TO HAVE A
10:47AM 18 CONVERSATION WITH THEM ABOUT WHETHER IT WOULD BE HELPFUL TO
10:47AM 19 PROVIDE THEM ACCESS.

10:47AM 20 THE COURT: IF JUSTICE'S IS MORE EFFICIENT, I THINK
10:47AM 21 THAT WOULD BE A RESOURCE THAT MIGHT BE SUGGESTED TO THE FDA TO
10:47AM 22 USE.

10:47AM 23 MR. CAZARES.

10:47AM 24 MR. CAZARES: YOUR HONOR, JUST TO RETURN BACK TO
10:47AM 25 MR. BOSTIC'S POINT REGARDING ACCESS AND THE CONTINUED CLAIM

10:47AM 1 THAT THE GOVERNMENT DOESN'T HAVE ACCESS TO THESE DOCUMENTS, THE
10:47AM 2 LETTERS THEMSELVES REQUESTING THAT THE AGENCIES PRODUCE
10:47AM 3 MATERIALS AND THE AGENCY'S RESPONSE EVEN IF IT'S READ AS
10:47AM 4 THEY'LL PRODUCE SOME MATERIALS AND NOT ALL OF THEM, THAT'S
10:47AM 5 ACCESS. THEY'RE SAYING, YES, YOU MAY HAVE THESE DOCUMENTS.

10:47AM 6 YOU KNOW, AT THIS POINT WHEN YOU GO BACK TO THE HISTORY OF
10:47AM 7 ALL OF THE DOCUMENTS ALREADY PRODUCED AND THE WILLINGNESS
10:47AM 8 REFLECTED BY THE AGENCIES THAT THEY'RE WILLING TO PRODUCE SOME
10:48AM 9 AT LEAST RESPONSIVE DOCUMENTS, THAT'S NOW UPON THE DEPARTMENT
10:48AM 10 OF JUSTICE. THE AGENCY HAS NOW REPRESENTED TO THIS COURT WE
10:48AM 11 WILL PRODUCE SOME MATERIALS.

10:48AM 12 WE DON'T THINK THAT THEY'VE NECESSARILY BEEN CLEAR ABOUT
10:48AM 13 EXACTLY THE SCOPE OF EVERYTHING THAT THEY PLAN TO PRODUCE AND
10:48AM 14 WHO THOSE CUSTODIANS ARE, FOR EXAMPLE, AT CMS, AND WE HAVE A
10:48AM 15 LOT OF OTHER QUESTIONS.

10:48AM 16 UNDER A RULE 16 ORDER WE COULD POSE THOSE QUESTIONS TO THE
10:48AM 17 DEPARTMENT OF JUSTICE AND THEY COULD THEN GET THOSE ANSWERS.

10:48AM 18 AS, AGAIN, THIS IS BEING SET UP, WE'RE GOING TO BE
10:48AM 19 BRINGING IN THE AGENCIES AND ASKING THESE QUESTIONS OF THEM,
10:48AM 20 AND I'M NOT SURE THAT IS GOING TO BE AN EFFICIENT METHOD TO GET
10:48AM 21 US TO THE POINT WHERE WE, THE DEFENSE, RECEIVE THE MATERIALS
10:48AM 22 WE'RE ENTITLED TO.

10:48AM 23 MR. COOPERSMITH: YOUR HONOR, IF I COULD ADD, I
10:48AM 24 UNDERSTAND WHY MR. BOSTIC IS MAYBE TRYING TO DISTANCE HIMSELF
10:48AM 25 FROM THE AGENCIES, BUT THE DEPARTMENT OF JUSTICE IS THE UNITED

1 STATES'S LAW FIRM. IT'S REALLY THE SAME THING. I WANT TO
2 BORROW MR. WADE'S GRAND JURY SUBPOENA ANALOGY. SO IF I GET A
3 GRAND JURY SUBPOENA -- THANK YOU, YOUR HONOR. IF I GET A GRAND
4 JURY SUBPOENA FOR A CORPORATE CLIENT, SO I'VE GOT INHOUSE
5 COUNSEL OF THE CORPORATE CLIENT, THAT'S THE EQUIVALENT OF THESE
6 AGENCY LAWYERS.

7 IF SOMEONE DIRECTED AN ORDER OR A REQUEST TO MOST OF MY
8 CORPORATE INHOUSE COUNSELS, THAT'S NOT WHAT THEY DO. THEY
9 WOULD BE LOST.

10 WHAT I WOULD DO IN THE FACE OF A SUBPOENA, AND I'M SURE
11 MR. BOSTIC IN OTHER CASES PROBABLY APPRECIATES THIS, IS I GO IN
12 THERE WITH MY TEAM, WITH MY RESOURCES, WITH MY CONSULTANT, WITH
13 MY FORENSIC PEOPLE, MY IMAGING PEOPLE, AND I MAKE SURE BECAUSE
14 I FEEL LIKE AT THAT POINT THAT I'M RESPONDING TO THE SUBPOENA,
15 AND IT'S MY OBLIGATION. I MAKE SURE THAT EVERY SINGLE DOCUMENT
16 THAT IS RESPONSIVE TO THE SUBPOENA IS PRODUCED. THAT'S ON ME,
17 AND THAT'S WHAT I DO EVERY SINGLE DAY IN THESE ROUTINE MATTERS.

18 SO MR. BOSTIC IS NO DIFFERENT. SO THE DEPARTMENT OF
19 JUSTICE HAS VAST LITIGATION RESOURCES. WHAT WOULD HAPPEN IF A
20 COURT ISSUED A RULE 16 ORDER TO THE GOVERNMENT, NOT TO THE
21 AGENCIES, IS THAT MR. BOSTIC AND HIS COLLEAGUES AT THE
22 DEPARTMENT OF JUSTICE WOULD TELL THE AGENCIES THE LITIGATION
23 TEAM IS HERE TO MAKE SURE THAT EVERY DOCUMENT IS PRODUCED. IT
24 WOULD BE A SEAMLESS THING. THE GOVERNMENT IS VERY USED TO
25 WORKING WITH AGENCIES. THAT'S WHAT THE DEPARTMENT OF JUSTICE

1 DOES. THEY WORK WITH AGENCIES EVERY SINGLE DAY IN VARIOUS
2 CONTEXTS.

3 SO A RULE 16 ORDER, YOUR HONOR, WOULD PUT ACCOUNTABILITY
4 ON THE GOVERNMENT. IT WOULD FREE UP THE DEPARTMENT OF JUSTICE
5 RESOURCES TO MAKE SURE EVERY DOCUMENT IS PRODUCED. IT WOULD
6 MAKE SURE THESE ARE PRODUCED IN THE TIMEFRAME THAT THE COURT IS
7 CONTEMPLATING, AND I THINK WE WOULD QUICKLY GET PAST THIS ISSUE
8 AND MOVE ON WITH THE REST OF THE CASE, AND I THINK THAT'S WHAT
9 IS REQUIRED HERE.

10 THIS IS A DEPARTMENT OF JUSTICE OBLIGATION UNDER THE CASE
11 LAW. IT'S NOT AN AGENCY OBLIGATION.

12 THE COURT: THANK YOU. I APPRECIATE IT.

13 MR. BOSTIC: YOUR HONOR, ON THAT POINT MAY I?

14 THE COURT: YES.

15 MR. BOSTIC: I DON'T THINK THAT'S CORRECT. WHAT I
16 JUST HEARD MR. COOPERSMITH SAY IS THAT IF THE COURT DIRECTED AN
17 ORDER AT THE PROSECUTION, THAT I AND MY COLLEAGUES WOULD GO TO
18 THE AGENCIES, HANDLE THE COLLECTION AND REVIEW EFFORTS
19 OURSELVES AND PRODUCE THE DOCUMENTS.

20 THAT DESCRIBES ACCESS TO THOSE DOCUMENTS, ACCESS THAT WE
21 DON'T HAVE, THAT WE'VE SHOWN THAT WE DON'T HAVE.

22 COMPONENTS OF THE DEPARTMENT OF JUSTICE REPRESENT THESE
23 AGENCIES IN DIFFERENT CAPACITIES. THAT'S NOT THE TRIAL TEAM IN
24 THIS CASE. THAT'S NOT THE CRIMINAL SIDE OF THE UNITED STATES
25 ATTORNEY'S OFFICE. AND IF IT WERE AS SIMPLE AS ME OR SOMEONE

10:51AM 1 IN MY POSITION SIMPLY GOING TO THOSE AGENCIES DEMANDING ACCESS
10:51AM 2 TO THE DOCUMENTS, GETTING THEM OURSELVES AND PRODUCING THEM, OF
10:51AM 3 COURSE THAT'S WHAT WE WOULD HAVE DONE. THAT'S JUST NOT A
10:51AM 4 PRACTICAL SOLUTION.

10:51AM 5 THE COURT: MR. WADE.

10:51AM 6 MR. WADE: WE UNDERSTAND. THE COURT HAS PROBABLY
10:51AM 7 HEARD ENOUGH AND IS READY TO RULE. I WOULD SAY THAT IN HEARING
10:51AM 8 WHAT THE GOVERNMENT SAID, WE NEED TO BE MINDFUL THAT AN ORDER
10:51AM 9 THAT DIRECTS THE GOVERNMENT TO FULFILL AN OBLIGATION CARRIED
10:51AM 10 INTO ONE OF THESE AGENCIES WILL BE HONORED.

10:51AM 11 WHAT WE DON'T WANT TO DO IS TO CREATE A CIRCUMSTANCE WHERE
10:51AM 12 THE LAW IN ANY WAY SUGGESTS THAT A CONTRIVANCE CAN HELP AVOID
10:52AM 13 AN OBLIGATION. SO WE'RE GOING TO SEND YOU A LETTER AND YOU
10:52AM 14 TELL US YOU WON'T PRODUCE IT, EVEN THOUGH YOU'VE GIVEN US
10:52AM 15 EVERYTHING THAT WE HAVE WANTED, HUNDREDS OF THOUSANDS OF PAGES
10:52AM 16 OF DOCUMENTS MONTH AFTER MONTH THROUGHOUT THE INVESTIGATION,
10:52AM 17 NOW TELL US THAT YOU WON'T GIVE IT TO US AND THEN WE WON'T HAVE
10:52AM 18 AN OBLIGATION.

10:52AM 19 I KNOW THAT'S NOT WHAT THE SPIRIT OF SANTIAGO AND SOME OF
10:52AM 20 THE NINTH CIRCUIT CASES ON THIS THAT HAVE MENTIONED WHAT MY
10:52AM 21 COLLEAGUE SUGGESTS, AND I KNOW THAT'S NOT WHAT THE GOVERNMENT
10:52AM 22 HAS BEEN DOING HERE AND I ACCEPT THEIR REPRESENTATIONS.

10:52AM 23 BUT I DON'T WANT US TO BE NAIVE HERE IN FAILING TO
10:52AM 24 RECOGNIZE THAT THE REASON THAT THEY HAVE NOT RESPONDED TO THOSE
10:52AM 25 REQUESTS AT THIS POINT --

10:52AM 1 THE COURT: THE AGENCY'S?

10:52AM 2 MR. WADE: THE AGENCY'S -- IS BECAUSE THEY KNOW THAT
10:52AM 3 THE GOVERNMENT HAS NO OBLIGATION ON THEM TO PROVIDE THOSE
10:52AM 4 MATERIALS. THAT IS THE REASON THOSE AGENCIES AREN'T PROVIDING
10:52AM 5 THEM.

10:52AM 6 EVERY OTHER REQUEST THAT THEY MADE AS BEST WE CAN TELL
10:53AM 7 THROUGH THE CORRESPONDENCE WAS HONORED.

10:53AM 8 THESE ARE DEFENSE REQUESTS AND THAT'S ONLY WHEN WE HIT --
10:53AM 9 THAT'S THE POINT AT WHICH WE HIT THE ROADBLOCK.

10:53AM 10 SO AGAIN, WE ALL WANT THE SAME THING, AND WE DO WANT
10:53AM 11 ACCOUNTABILITY AS OUR COLLEAGUES HAVE SUGGESTED. THERE ARE A
10:53AM 12 VARIETY OF WAYS TO GET ACCOUNTABILITY. WE JUST NEED TO AVOID
10:53AM 13 FURTHER DELAY.

10:53AM 14 THE COURT: WELL, I AGREE WITH YOU. THE ORDER THAT
10:53AM 15 IS CONTEMPLATED BY THE COURT IS NOT A CONTRIVANCE.

10:53AM 16 MR. WADE: OF COURSE.

10:53AM 17 THE COURT: YOU WEREN'T SUGGESTING THAT. I
10:53AM 18 APPRECIATE THAT, MR. WADE.

10:53AM 19 BUT RATHER IT'S A DEVICE THAT AFTER HEARING FROM YOU,
10:53AM 20 READING THE PLEADINGS AND UNDERSTANDING THE DEFENSE FRUSTRATION
10:53AM 21 ABOUT NOT HAVING ACCESS TO THESE AND YOUR DISAGREEMENT WITH THE
10:53AM 22 GOVERNMENT AS TO WHETHER OR NOT THEY HAVE ACCESS UNDER THE
10:53AM 23 JUSTICE UMBRELLA, IF YOU WILL, THE COURT FEELS THAT IT SEEMS
10:53AM 24 THAT THE MOST DIRECT METHOD IS TO GO TO THE AGENCIES.

10:53AM 25 WE'VE HAD THESE LETTERS FROM THESE LAWYERS REPRESENTING

10:54AM 1 AT LEAST TO THE COURT THROUGH THE GOVERNMENT THAT THEY INTEND
10:54AM 2 TO FULFILL THEIR OBLIGATION TO PROVIDE THIS INFORMATION. I'M
10:54AM 3 GOING TO CALL THEM TO TASK ON THAT, AND I'M GOING TO ORDER THAT
10:54AM 4 THEY PRODUCE PURSUANT TO THEIR REPRESENTATIONS TO THE COURT.

10:54AM 5 IT SEEMS TO ME THAT'S THE MOST DIRECT WAY AND EFFECTIVE
10:54AM 6 WAY NOTWITHSTANDING RULE 16. I APPRECIATE THAT, AND I
10:54AM 7 APPRECIATE THE DEFENSE CONCERN THAT THERE IS A RESPONSIBILITY,
10:54AM 8 A CONSTITUTIONAL RESPONSIBILITY UNDER RULE 16, AND I RECOGNIZE
10:54AM 9 THAT.

10:54AM 10 BUT I WANT TO GO TO THE AGENCIES BECAUSE I BELIEVE AT THIS
10:54AM 11 POINT IN OUR DISCUSSION THAT IS THE MOST EFFECTIVE WAY TO GET
10:54AM 12 THE INFORMATION THAT YOU AND YOUR COLLEAGUES WANT AND YOU'RE
10:54AM 13 ENTITLED TO AND THAT'S WHY I'M GOING DOWN THIS AVENUE, IF YOU
10:54AM 14 WILL.

10:54AM 15 I'M NOT SAYING THAT THE GOVERNMENT IS OFF FREE FROM
10:54AM 16 ANYTHING, AND THIS DOES NOT SAY IN ANY WAY THAT THERE IS NO
10:54AM 17 RULE 16 OBLIGATION ON THE GOVERNMENT. NO. NO. THAT REMAINS.

10:55AM 18 BUT AT THIS POINT HAVING THIS CORRESPONDENCE AND YOU AND
10:55AM 19 YOUR TEAMS HAVE EQUALLY CORRESPONDED WITH THESE AGENCIES TO
10:55AM 20 DEVELOP SOME TYPE OF TRACTION ON THIS, NOT AS MUCH AS YOU WOULD
10:55AM 21 LIKE, BUT AT LEAST THERE'S A PATH TO THIS, AND I'D LIKE TO TAKE
10:55AM 22 ADVANTAGE OF YOUR GOOD EFFORTS, GO DIRECTLY TO THE AGENCIES AND
10:55AM 23 TELL THEM TO PRODUCE.

10:55AM 24 AS I'VE SAID, 75 DAYS IS WHAT I'M GOING TO GIVE THEM. I
10:55AM 25 HOPE THEY CAN DO IT IN 75 DAYS. I HOPE THEY CAN RISE TO THE

OCCASION TO PRODUCE THAT.

IF NOT, THEY WILL TELL US WHY THEY CAN'T. MY SENSE IS IN THE ORDER I'LL INSTITUTE SOME TYPE OF A STATUS DATE WHERE THEY'LL UPDATE US, AND PERHAPS IT MIGHT BE THROUGH THE GOVERNMENT ALSO, THE PROSECUTION, AS TO WHAT THE STATUS IS AND WHY NOT.

AND THEN IT MAY BE THAT WE'LL EXTEND AN INVITATION TO THE RESPONSIBLE PARTIES FROM THE AGENCIES TO COME TO THE COURT AND EXPLAIN THEIR LACK OF ATTENTION OR THEIR LACK OF ABILITY TO COMPLY. I DON'T KNOW. I HOPE WE DON'T. I HOPE THEY GIVE EVERYTHING THAT YOU'RE ASKING FOR.

MR. WADE: HOPEFULLY THAT'S EFFECTIVE, YOUR HONOR. I AM SURE THE GOVERNMENT DOES REMAIN INVESTED TO THE EXTENT THAT IT HAS TO COME BACK TO THE COURT REPRESENTING THE UNITED STATES AND IT'S TRIAL DATE HANGS IN THE BALANCE AS WELL.

THE COURT: YES.

MR. WADE: SO UNDERSTANDING THAT IT WANTS TO MOVE THIS FORWARD, I'M CONFIDENT THAT THEY'LL CONTINUE TO RECOGNIZE THE DIRECTION PROVIDED BY THE COURT AND WHAT THE COURT WISHES AND INCURS FULL COMPLIANCE WITH THAT ORDER AND PROMPT COMPLIANCE.

THE COURT: YES. THANK YOU. AND THIS IS NOT GIVING THE GOVERNMENT A PASS ON THIS. MY SENSE IS THAT YOU AND YOUR TEAM, YOUR COLLEAGUES SEEM TO FEEL THAT IT IS. IT IS NOT.

IT IS A MORE DIRECT OFF RAMP, IF YOU WILL, IN MY JUDGMENT

10:56AM 1 TO GET THE INFORMATION SOONER THAN LATER. THAT'S WHAT I WANT
10:56AM 2 TO ACCOMPLISH.

10:56AM 3 MR. WADE: I HOPE THAT'S RIGHT, YOUR HONOR. THE
10:56AM 4 ONLY FEAR I HAVE IS THAT GIVING THEM FURTHER OPPORTUNITY TO
10:56AM 5 COME IN AND AVOID OBLIGATIONS JUST HAS THE POTENTIAL TO DELAY
10:56AM 6 THINGS FURTHER, THE AGENCIES. AND WE MAY -- AS THE COURT SAID,
10:57AM 7 WE MAY HEAR THAT, WHICH WILL JUST HAVE THE EFFECT OF DELAYING
10:57AM 8 THESE MATERIALS TO ANOTHER HEARING 75 DAYS HENCE THAT WOULD BE
10:57AM 9 REGRETFUL. I KNOW THAT THE GOVERNMENT WOULD SHARE THAT FEELING
10:57AM 10 AND HOPEFULLY THEY WILL BE ABLE TO URGE THE AGENCIES TO BE MORE
10:57AM 11 EXPEDITIOUS AND IN MEETING THE COURT'S WISHES AND ULTIMATELY, I
10:57AM 12 GUESS, EVERYONE SUFFERS THE CONSEQUENCES IF THEY DON'T.

10:57AM 13 THE COURT: OKAY. THANK YOU.

10:57AM 14 LET ME MOVE TO THE NEXT ISSUE.

10:57AM 15 ANYTHING FURTHER ON THAT?

10:57AM 16 MR. CAZARES: TWO SMALL POINTS IN THAT ARGUMENT,
10:57AM 17 YOUR HONOR. REGARDING THE LANGUAGE OF THE PROPOSED ORDER, I
10:57AM 18 THINK WE WOULD REQUEST THAT IT INCLUDE THE SCOPE OF THE
10:57AM 19 DOCUMENT REQUEST CONTAINED IN THE MOTION RATHER THAN THE
10:57AM 20 DESCRIPTION BY THE AGENCIES OF THE DOCUMENTS THAT THEY ARE
10:57AM 21 PLANNING TO PRODUCE BECAUSE I'M NOT SURE THAT THOSE TWO
10:57AM 22 DESCRIPTIONS OF THE REQUEST AND DOCUMENTS AT ISSUE HERE ARE
10:57AM 23 NECESSARILY 100 PERCENT CONSISTENT. SO THAT'S ONE REQUEST.

10:57AM 24 AND THEN THE SECOND, AND I'M NOT SURE IF I'M HEARING THE
10:58AM 25 COURT CORRECTLY ON THIS, SO IS THE COURT PLANNING TO ISSUE A

10:58AM 1 RULE 16 ORDER DIRECTED TO THE AGENCIES SO IT WILL BE UNDER RULE
10:58AM 2 16 BUT DIRECTED TO THE AGENCIES?

10:58AM 3 THE COURT: I DON'T THINK SO.

10:58AM 4 MR. CAZARES: OKAY. I'M TRYING TO CLARIFY THAT,
10:58AM 5 YOUR HONOR. THANK YOU.

10:58AM 6 THE COURT: YOU'RE WELCOME.

10:58AM 7 LET ME MOVE TO THE NEXT ISSUE WHICH IS, AS I SEE IT, IS
10:58AM 8 THIS ISSUE ABOUT AGENT NOTES. THE DEFENSE HAS APPARENTLY BEEN
10:58AM 9 GIVEN ACCESS TO REVIEW NOTES IT SOUNDS LIKE. THE GOVERNMENT
10:58AM 10 HAS ALLOWED THE DEFENSE TO GO TO THEIR OFFICE IN SAN FRANCISCO
10:58AM 11 AND REVIEW NOTES, MAKE NOTES OF THOSE, BUT NOT -- THE
10:58AM 12 GOVERNMENT HASN'T PROVIDE HARD COPIES OF THOSE NOTES.

10:58AM 13 I GUESS JUST TO CUT TO THE CHASE HERE, MY QUESTION IS WHY
10:58AM 14 NOT GIVE THEM, IF THEY'RE LOOKING AT IT, WHY NOT GIVE THEM THE
10:58AM 15 HARD COPIES WITH A PROTECTIVE ORDER "ATTORNEYS EYES ONLY,"
10:58AM 16 WHATEVER NEEDS TO BE PUT ON IT? WHY NOT DO THAT?

10:58AM 17 MR. BOSTIC: BECAUSE, YOUR HONOR, THE STEP THAT THE
10:58AM 18 GOVERNMENT HAS ALREADY TAKEN IS -- IT REPRESENTS ALREADY
10:59AM 19 EXCEEDING THE REQUIREMENTS OF BRADY AND THE ASSOCIATED CASE
10:59AM 20 LAW.

10:59AM 21 AS THE COURT KNOWS, THE BRADY OBLIGATIONS, AS WELL AS THE
10:59AM 22 JENCKS OBLIGATIONS ON THE GOVERNMENT, THOSE ARE SELF-EXECUTING.
10:59AM 23 THEY DON'T REQUIRE A COURT ORDER. THEY IMPOSE AN OBLIGATION ON
10:59AM 24 THE PROSECUTORS THEMSELVES TO IDENTIFY, LOCATE, REVIEW, AND
10:59AM 25 PRODUCE MATERIAL THAT COULD BE USEFUL TO THE DEFENSE. WE TAKE

10:59AM 1 THAT OBLIGATION VERY SERIOUSLY.

10:59AM 2 THE USUAL APPROACH IN ALMOST EVERY CASE IS FOR THE
10:59AM 3 GOVERNMENT TO HANDLE THAT OBLIGATION DIRECTLY, TO REVIEW THOSE
10:59AM 4 NOTES, TO REVIEW OTHER MATERIALS THAT MAY CONTAIN BRADY
10:59AM 5 INFORMATION, AND TO PRODUCE WHAT IT IDENTIFIES AS BRADY
10:59AM 6 INFORMATION TO THE DEFENSE ERRING ON THE SIDE OF PRODUCTION IF
10:59AM 7 THERE'S A QUESTION.

10:59AM 8 THAT WOULD BE THE GOVERNMENT'S APPROACH IN THIS CASE.

10:59AM 9 BUT AFTER THE DEFENSE RAISED AN ISSUE, WE OFFERED TO GO
10:59AM 10 ONE STEP FURTHER AND TO ACTUALLY ALLOW THE DEFENSE TO BE
10:59AM 11 INVOLVED IN THAT PROCESS. THAT'S AN EXCEPTION. THAT'S NOT THE
11:00AM 12 USUAL APPROACH. USUALLY, AS I SAID, THAT RESPONSIBILITY LIES
11:00AM 13 WITH THE GOVERNMENT.

11:00AM 14 HERE ALLOWING THE DEFENSE TO REVIEW THOSE NOTES TAKES THE
11:00AM 15 JUDGMENT CALLS OUT OF THE GOVERNMENT'S HANDS AND ALLOWS THE
11:00AM 16 DEFENSE TO MAKE UP ITS OWN MIND ABOUT WHAT IT THINKS IT NEEDS
11:00AM 17 IN TERMS OF BRADY INFORMATION.

11:00AM 18 BECAUSE THAT ALREADY REPRESENTS A SIGNIFICANT DEPARTURE
11:00AM 19 FROM WHAT THEY'RE ENTITLED TO UNDER BRADY, THE GOVERNMENT FEELS
11:00AM 20 THAT IT'S -- THAT THAT STEP IS SUFFICIENT TO SATISFY ITS
11:00AM 21 OBLIGATIONS.

11:00AM 22 THE COURT: SURE. AND I APPRECIATE THAT. YOU KNOW,
11:00AM 23 LET ME JUST EXPRESS, ANYTHING THAT ALL OF YOU DO TO ENHANCE,
11:00AM 24 AND I HATE TO USE THE WORD "EFFICIENCY" IN A CRIMINAL CASE
11:00AM 25 BECAUSE IT'S NOT ABOUT THAT, BUT AT THE PRETRIAL STAGE ANYTHING

11:00AM 1 THAT YOU DO TO ENHANCE THE ABILITY TO MORE EFFICIENTLY
11:00AM 2 REPRESENT YOUR RESPECTIVE PARTIES I'M GRATEFUL FOR THAT.

11:00AM 3 BUT IT SEEMS TO ME THAT IF THEY'VE LOOKED AT IT AND YOU'RE
11:00AM 4 GIVING THEM ACCESS TO LOOK AT IT, BUT NOT MAKE PHOTOCOPIES OR
11:01AM 5 ANYTHING LIKE THAT, COULDN'T YOU -- AND WE'VE READ THE
11:01AM 6 DECLARATIONS. IT'S DIFFICULT FOR THEM TO COME FROM SEATTLE,
11:01AM 7 LOS ANGELES, THIS IS AS TO MR. BALWANI, AND SPEND FOUR OR
11:01AM 8 FIVE HOURS ON GOLDEN GATE AND REVIEW DOCUMENTS.

11:01AM 9 WHY NOT GIVE THEM -- PROVIDE HARD COPIES SO THAT THEY CAN
11:01AM 10 DO THIS IN THEIR OFFICE WITH AN "ATTORNEYS EYES ONLY" WITH AN
11:01AM 11 ORDER THAT SAYS THAT THEY MAY NOT REPRODUCE. THEY HAVE TO KEEP
11:01AM 12 A LOG OF WHO -- WHATEVER AND WHOEVER SEES IT AND WHATEVER AND
11:01AM 13 EVEN GIVE THEM A CERTAIN TIME PERIOD? YOU CAN HAVE THESE FOR A
11:01AM 14 WEEK. YOU CAN HAVE THESE FOR WHATEVER. I'M JUST GENERATING
11:01AM 15 OPTIONS, JUST TO ALLOW THAT EFFICIENCY, AND THEN YOU CAN
11:01AM 16 RETURN THE HARD COPIES, OR IF THEY KEEP IT, THEY KEEP IT AGAIN
11:01AM 17 WITH A PROTECTIVE ORDER OF SOME SORT.

11:01AM 18 IT SEEMS THAT -- AND I DON'T MEAN TO PUNISH YOU FOR
11:01AM 19 BEING -- YOU KNOW, PUNISH THE PROSECUTION FOR BEING GENEROUS
11:02AM 20 HERE, BUT IT SEEMS LIKE IF THEY'VE SEEN IT AND THEY'RE GOING TO
11:02AM 21 CONTINUE TO REVIEW IT, WHY NOT JUST LET THEM HAVE COPIES OF IT
11:02AM 22 SO THAT THEY CAN LOOK AT IT AND WE CAN SOMEHOW PROTECT THE
11:02AM 23 DISSEMINATION OF IT? I'M SURE THEY WOULD AGREE TO SOMETHING
11:02AM 24 LIKE THAT.

11:02AM 25 MR. BOSTIC: SO, YOUR HONOR, AS I TAKE THE COURT'S

11:02AM 1 POINT, A LOT OF THIS RELATES TO THE INCONVENIENCE SUFFERED BY
11:02AM 2 THE DEFENSE COUNSEL AND HAVING TO TRAVEL OUT TO REVIEW THE
11:02AM 3 NOTES.

11:02AM 4 I THINK AS A COMPROMISE POSITION THE GOVERNMENT WOULD BE
11:02AM 5 WILLING TO MAKE THOSE NOTES AVAILABLE IN LOCAL U.S. ATTORNEY'S
11:02AM 6 OFFICES IN SEATTLE OR LOS ANGELES AND D.C. FOR MS. HOLMES'S
11:02AM 7 COUNSEL. THAT WOULD AVOID THE TRAVEL OBLIGATIONS.

11:02AM 8 THE COURT: SURE.

11:02AM 9 MR. BOSTIC: I THINK THE COURT IS ACKNOWLEDGING THE
11:02AM 10 FACT THAT THESE ARE SENSITIVE MATERIALS, THAT THEY WOULD NEED
11:02AM 11 TO BE PROTECTED BY AN "ATTORNEYS EYES ONLY" PROTECTIVE ORDER OR
11:02AM 12 SOMETHING SIMILAR.

11:02AM 13 THE GOVERNMENT WOULD STILL PREFER NOT TO RELINQUISH
11:03AM 14 CUSTODY OF THOSE MATERIALS FOR THAT REASON, AND I THINK IT IS
11:03AM 15 SUFFICIENT TO ALLOW THE DEFENSE TO VISIT A U.S. ATTORNEY'S
11:03AM 16 OFFICE AND REVIEW THOSE NOTES, AND THEN, AGAIN, THE OFFER IS TO
11:03AM 17 PRODUCE ANY NOTES THAT THEY IDENTIFY AS CONTAINING BRADY
11:03AM 18 INFORMATION.

11:03AM 19 SO I THINK THAT SATISFIES THEIR NEEDS.

11:03AM 20 THE COURT: SURE. WHAT IS THE VOLUME OF MATERIAL?
11:03AM 21 IS IT BINDERS? I READ SOMETHING ABOUT BINDERS. ARE THERE
11:03AM 22 BINDERS OF THOSE?

11:03AM 23 MR. BOSTIC: YOUR HONOR, THE DEFENSE MAY BE ABLE TO
11:03AM 24 SPEAK TO THAT BETTER THAN I HAVE BECAUSE THEY'VE BEEN IN THE
11:03AM 25 ROOM WITH IT.

11:03AM 1 BUT I CAN TELL THE COURT THAT, OF COURSE, DOZENS OF
11:03AM 2 WITNESSES HAVE BEEN INTERVIEWED.

11:03AM 3 ONE MOMENT, YOUR HONOR.

11:03AM 4 MR. LEACH: YOUR HONOR, IT'S THREE BINDERS AND
11:03AM 5 APPROXIMATELY 800 PAGES.

11:03AM 6 THE COURT: OKAY. THANK YOU, MR. LEACH. I
11:03AM 7 APPRECIATE THAT.

11:03AM 8 DO YOU HAVE FACILITIES TO -- IF THE COURT ORDERS THAT THE
11:03AM 9 GOVERNMENT PROVIDE YOU COPIES AND THE COURT ORDERS YOU TO MEET
11:03AM 10 AND CONFER ON AN ATTORNEYS EYES ONLY AGREEMENT, DO YOU HAVE IN
11:03AM 11 YOUR LAW OFFICES SAFES WHERE THESE COPIES CAN BE LOCKED UP?

11:04AM 12 MR. COOPERSMITH: YES, YOUR HONOR. I'VE HAD CASES
11:04AM 13 IN OUR OFFICE WHERE WE'VE HANDLED NATIONAL SECURITY
11:04AM 14 INFORMATION, AND WE HAVE ALL KINDS OF WAYS TO KEEP IT. I'M NOT
11:04AM 15 SURE THAT THIS RISES TO THAT LEVEL, BUT WE HAVE THAT ABILITY.

11:04AM 16 LET ME ADDRESS A FEW POINTS TO CLARIFY SOMETHING. I HAVE
11:04AM 17 NOT HEARD ANYTHING FROM MR. BOSTIC A REAL REASON NOT TO GIVE US
11:04AM 18 COPIES, BUT HERE'S SOME OF THE PRACTICAL CONSIDERATIONS I WOULD
11:04AM 19 LIKE THE COURT TO CONSIDER.

11:04AM 20 FIRST OF ALL, THERE ARE 848 PAGES OF NOTES THAT WE'VE SEEN
11:04AM 21 SO FAR. THERE MAY BE MORE AS THE CASE PROCEEDS IN THE NEXT
11:04AM 22 YEAR.

11:04AM 23 THESE ARE VERY DENSE, YOU KNOW, VERY SOMETIMES
11:04AM 24 HARD-TO-READ HANDWRITING AND THE ISSUE, AS THE GOVERNMENT
11:04AM 25 ITSELF IDENTIFIED IN THE MOTION TO COMPEL, IS THAT YOU HAVE TO

11:04AM 1 LOOK FOR MATERIAL INCONSISTENCIES BETWEEN THE 302 REPORT, THE
11:04AM 2 INTERVIEW MEMO, AND THE NOTES. AND WE'VE ALREADY FOUND MANY OF
11:04AM 3 THOSE INSTANCES WHERE THE NOTES ARE FAVORABLE TO THE DEFENSE IN
11:04AM 4 A WAY THAT THE 302 DOES NOT QUITE CAPTURE. SO WE'VE SEEN IT
11:04AM 5 OVER AND OVER AGAIN AND EVEN IN THE TIME WE HAVE.

11:05AM 6 WE'VE GOT THROWN A HANDFUL OF THESE IN A SIX HOUR SESSION.
11:05AM 7 ONE OF THE PROBLEMS, YOUR HONOR -- AND BY THE WAY, THE
11:05AM 8 "ATTORNEYS EYES ONLY" I'M NOT SURE IS THE RIGHT NOMENCLATURE.
11:05AM 9 WE'RE PERFECTLY HAPPY TO KEEP THEM CONFIDENTIAL AND PROTECTED
11:05AM 10 IN LOCKED CABINETS OR WHATEVER THE REQUIREMENT IS.

11:05AM 11 "ATTORNEYS EYES ONLY" IS A DIFFERENT THING. THAT MEANS
11:05AM 12 OUR CLIENT COULD NOT SEE IT, AND MR. BALWANI IS A PART OF THE
11:05AM 13 DEFENSE TEAM. HE WAS THERE WITH THE GOVERNMENT'S FULL
11:05AM 14 KNOWLEDGE AT THE SESSION. WE HAD THE U.S. ATTORNEY'S OFFICE
11:05AM 15 LAST WEEK REVIEWING THE NOTES. SO HE HAS A RIGHT TO
11:05AM 16 PARTICIPATE IN HIS OWN DEFENSE.

11:05AM 17 SO I DON'T KNOW THAT THE GOVERNMENT HAS AN OBJECTION TO
11:05AM 18 MR. BALWANI SEEING IT, IT'S MORE OF A CONFIDENTIALITY CONCERN.

11:05AM 19 THE COURT: THIS IS WHY I SAID I MIGHT ASK YOU TO
11:05AM 20 MEET AND CONFER ON AN APPROPRIATE ORDER --

11:05AM 21 MR. COOPERSMITH: YES, YOUR HONOR.

11:05AM 22 THE COURT: -- THAT EXPRESSES THE CONCERNS THAT I
11:05AM 23 HAVE THAT THESE DOCUMENTS AND THE INFORMATION SHOULD NOT BE
11:05AM 24 REPRODUCED, IT SHOULD NOT BE DISTRIBUTED OUTSIDE OF COUNSEL'S
11:05AM 25 OFFICE, AND IT'S FOR COUNSEL'S USE.

11:05AM 1 MR. COOPERSMITH: YES, YOUR HONOR, THAT'S PERFECTLY
11:06AM 2 ACCEPTABLE, AND I'M HAPPY TO TALK TO MR. BOSTIC ABOUT THAT.

11:06AM 3 THE OTHER ISSUE I WANT TO MAKE SURE THE COURT IS AWARE AND
11:06AM 4 IT'S IN STATUS REPORT AND AS WELL AS THE LETTER ATTACHED IS
11:06AM 5 THAT WHAT HAS HAPPENED HERE IS THE GOVERNMENT, AND I'M NOT SURE
11:06AM 6 I WOULD USE THE WORD "GENEROUS" TO DESCRIBE IT, BUT WE DO
11:06AM 7 APPRECIATE THE ACCESS, I THINK WHAT HAS HAPPENED HERE IS
11:06AM 8 WITHOUT KNOWING THE DEFENSE THEORIES AND HAVING MANY, MANY
11:06AM 9 PAGES OF HARD-TO-READ NOTES, THERE'S A REAL RISK THAT THE
11:06AM 10 PROSECUTION TRYING TO DO THEIR OWN REVIEW WOULDN'T CAPTURE ALL
11:06AM 11 OF THE BRADY MATERIAL.

11:06AM 12 SO THEY'VE GIVEN THAT, AND WE'RE HAPPY TO ACCEPT THAT
11:06AM 13 OBLIGATION.

11:06AM 14 THE PROBLEM IS HAVING DONE THAT AND NOW THAT WE ARE
11:06AM 15 LOOKING AT THIS, AND WE'RE HOPING TO GET COPIES OBVIOUSLY SO WE
11:06AM 16 DON'T KEEP GOING TO THE CONFERENCE ROOM AT THE U.S. ATTORNEY'S
11:06AM 17 OFFICE.

11:06AM 18 BUT NOW THAT THEY'VE DONE THAT, IT'S NOT APPROPRIATE FOR
11:06AM 19 US TO HAVE TO IDENTIFY TO THE PROSECUTION WE THINK THESE 10
11:06AM 20 SETS OF NOTES OR THESE 30 SETS OF NOTES ARE BRADY MATERIAL
11:06AM 21 BECAUSE THEY HAVE EXCULPATORY INFORMATION. THAT'S DEFENSE
11:06AM 22 STRATEGY. THAT'S DEFENSE WORK PRODUCT. IT'S OUR SELECTION OF
11:07AM 23 WHAT IS IMPORTANT. THEY'RE NOT ENTITLED TO KNOW THAT. THERE
11:07AM 24 HAS TO BE A MECHANISM IF WE GET COPIES WHERE WE'RE ABLE TO COPY
11:07AM 25 THINGS SO WE CAN USE IT AND PREPARE FOR TRIAL AND

11:07AM 1 CROSS-EXAMINATION AND ESPECIALLY AGENTS.

11:07AM 2 THE COURT: WELL, THAT'S A SECOND STEP. MAY I
11:07AM 3 SUGGEST, AND IF YOU FEEL THAT YOU NEED TO DO THAT AND I
11:07AM 4 UNDERSTAND THE SIXTH AMENDMENT AND ALL OF THAT AND IT IS
11:07AM 5 IMPORTANT TO THE DEFENSE. IT MAY BE THAT WE CAN DEVELOP A
11:07AM 6 MECHANISM WHERE YOU CAN SEPARATE THOSE AND IDENTIFY THOSE AND
11:07AM 7 BRING THOSE TO THE COURT IN SOME MANNER THAT PROTECTS YOU FROM
11:07AM 8 OTHERWISE DISCLOSING THE DEFENSE STRATEGIES.

11:07AM 9 MR. COOPERSMITH: THAT'S POSSIBLE. IT PUTS THE
11:07AM 10 ACTUAL BURDEN ON THE COURT BUT --

11:07AM 11 THE COURT: I HEAR THE SURF, COUNSEL.

11:07AM 12 MR. COOPERSMITH: -- COULDN'T APPRECIATE THAT MORE,
11:07AM 13 YOUR HONOR. I REALIZE THAT -- I JUST THINK THAT THE GOVERNMENT
11:07AM 14 IS OVERPLAYING HOW TOP SECRET THESE MATERIALS ARE. I THINK
11:07AM 15 WITH A SIMPLE LIKE THEY'RE NOTES, OKAY, THEY'RE NOTES THAT
11:07AM 16 UNDERLIE INTERVIEWS. THIS IS NOT NATIONAL SECURITIES
11:08AM 17 INFORMATION. THIS IS NOT THE CROWN JEWELS.

11:08AM 18 THE COURT: DON'T SNATCH DEFEAT FROM THE JAWS OF
11:08AM 19 VICTORY.

11:08AM 20 MR. COOPERSMITH: NO, I AM NOT. I HOPE THAT IS NOT
11:08AM 21 HAPPENING, YOUR HONOR. BUT I THINK THEY'RE IMPORTANT TO THE
11:08AM 22 DEFENSE BECAUSE OF THE MATERIAL DISCREPANCIES WHERE IT'S MORE
11:08AM 23 FAVORABLE TO THE DEFENSE. BUT WE HAVE COPIES, AND WE WERE ABLE
11:08AM 24 ABLE TO MAKE A FEW COPIES. WE WILL AGREE TO USE IT FOR TRIAL
11:08AM 25 PREPARATION AND TRIAL. I DON'T SEE HOW THAT AFFECTS THE

11:08AM 1 GOVERNMENT. I HAVE NOT REALLY HEARD A GOOD REASON WHY IT HAS
11:08AM 2 TO BE --

11:08AM 3 THE COURT: WELL, THE CONCERN I HAVE IS -- AND I
11:08AM 4 DON'T THINK THE GOVERNMENT HAS THIS, BUT I DO -- IS THAT
11:08AM 5 INFORMATION LIKE THIS WOULD BE DISSEMINATED IN THE PUBLIC OR
11:08AM 6 OTHERWISE BE MADE AVAILABLE WHERE IT'S NOT SUPPOSED TO BE.

11:08AM 7 MR. COOPERSMITH: WE WOULDN'T DO THAT, YOUR HONOR.

11:08AM 8 THE COURT: BUT IF YOU'RE GOING TO USE IT FOR
11:08AM 9 IMPEACHMENT PURPOSES OR SOMETHING LIKE THAT, THAT'S A DIFFERENT
11:08AM 10 STORY.

11:08AM 11 MR. COOPERSMITH: BUT, YOUR HONOR, WE HAVE NO WISH
11:08AM 12 TO MAKE ANY OF THOSE NOTES PUBLIC. WE'RE ABSOLUTELY AGREEABLE
11:08AM 13 TO A CONFIDENTIALITY ORDER, PROTECTIVE ORDER WHERE WE CAN'T DO
11:08AM 14 ANYTHING OTHER THAN USE IT FOR TRIAL PREP, AND THEN OBVIOUSLY
11:08AM 15 AT TRIAL ITSELF IF THE NEED ARISES. THAT'S FINE WITH US, YOUR
11:09AM 16 HONOR. WE'RE NOT GOING TO TRY TO PUBLICLY DISSEMINATE THESE
11:09AM 17 MATERIALS, ABSOLUTELY.

11:09AM 18 IT'S JUST THAT WE NEED TO BE ABLE TO DO OUR TRIAL PREP
11:09AM 19 WITHOUT REVEALING WHAT WE THINK IS IMPORTANT TO THE GOVERNMENT.

11:09AM 20 THE COURT: NO. I UNDERSTAND.

11:09AM 21 MR. WADE.

11:09AM 22 MR. WADE: IF I MIGHT BRIEFLY, YOUR HONOR. AT THE
11:09AM 23 TIME THE STATUS REPORT WAS FILED WE HADN'T YET HAD THE BENEFIT
11:09AM 24 OF REVIEWING THE NOTES. UNLIKE DEFENSE COUNSEL, I JUST HAD TO
11:09AM 25 TAKE THEM UP ON THE OFFER TO DO IT HERE IN SAN JOSE, BEAUTIFUL

11:09AM 1 SAN JOSE, SO I WALKED ACROSS AND HAD THE CHANCE TO DO THAT
11:09AM 2 YESTERDAY.

11:09AM 3 THERE IS A PRACTICAL ISSUE AS IT RELATES TO THIS. I
11:09AM 4 DIDN'T SPEND SIX HOURS. I SPENT ABOUT TWO OR THREE YEARS WITH
11:09AM 5 A KIND YOUNG FBI AGENT MAKING SURE I DIDN'T DO WHAT
11:09AM 6 SANDY BERGER WAS ACCUSED OF A NUMBER OF YEARS AGO.

11:09AM 7 BUT AS A PRACTICAL MATTER IN WORKING WITH THE MATERIALS,
11:09AM 8 WHAT COUNSEL FOR MR. BALWANI SAID IS VERY MUCH REAL, BUT THE
11:09AM 9 SECOND POINT IS WHERE I WANT TO FOCUS WHICH IS THE USE OF THOSE
11:09AM 10 MATERIALS.

11:09AM 11 I SPENT CONSIDERABLE TIME GOING THROUGH A COUPLE OF
11:10AM 12 WITNESSES, AND I'M COMFORTABLE REPRESENTING TO THE COURT THAT
11:10AM 13 WERE THOSE WITNESSES TO TESTIFY AT TRIAL, I WOULD CROSS-EXAMINE
11:10AM 14 THEM USING THOSE NOTES.

11:10AM 15 THERE IS, BASED UPON MY QUICK REVIEW, BRADY IN ALMOST
11:10AM 16 EVERY SET OF NOTES THAT I SAW OR THAT I READ CAREFULLY.

11:10AM 17 UNLIKE COUNSEL FOR MR. BALWANI, I'M NOT COMFORTABLE
11:10AM 18 LETTING THIS TEMPORARY ACCESS MEET A BRADY OBLIGATION BECAUSE I
11:10AM 19 NEED TO HAVE THE INFORMATION IN BRADY THAT I CAN USE TO DEFEND
11:10AM 20 MY CLIENT. TO JUST HAVE ACCESS TO IT AND NOT BE ABLE TO USE IT
11:10AM 21 IN THE DEFENSE, TO HAVE SOME LIMITED WINDOW WHICH I CAN MAKE
11:10AM 22 THE ASSESSMENT OF HOW TO USE IT IS JUST NOT REALLY WORKABLE AND
11:10AM 23 IT WOULD NOT ALLOW US TO PREPARE FOR THE DEFENSE.

11:10AM 24 I THINK THIS, LIKE ALL OF THE ISSUES THAT HAVE BEEN BEFORE
11:10AM 25 THE COURT --

11:10AM 1 THE COURT: I'M SORRY, SIR. IF YOU WERE GIVEN -- IF
11:10AM 2 I ORDER THE GOVERNMENT TO PROVIDE YOU COPIES OF THE 800 PAGES.

11:10AM 3 MR. WADE: THAT WOULD MEET THE OBLIGATION, YES. AND
11:10AM 4 THE ONLY RESTRICTION ON USE BEING WE WOULD USE IT TO PREPARE
11:11AM 5 THE DEFENSE AND POTENTIALLY TO EXAMINE WITNESSES IN AN OPEN
11:11AM 6 COURTROOM, BUT APART FROM THAT, BELIEVE ME, NO ONE ELSE IS
11:11AM 7 REALLY GOING TO WANT TO LOOK AT THESE NOTES, AND THIS IS NOT A
11:11AM 8 FUN EXERCISE. IT'S LABORIOUS.

11:11AM 9 BUT THAT WOULD -- IF WE'RE ABLE TO GET AND KEEP THE NOTES,
11:11AM 10 NOT JUST HAVE ACCESS BUT KEEP THEM THROUGH TRIAL, AND THEN WE
11:11AM 11 CAN GIVE THEM BACK IMMEDIATELY, THAT WOULD MEET OUR ISSUES.

11:11AM 12 THE COURT: OKAY. SO, MR. BOSTIC, I THINK YOU SEE
11:11AM 13 WHERE I'M HEADED. I HOPE YOU DO. I'M INCLINED TO ORDER THE
11:11AM 14 GOVERNMENT TO PROVIDE DEFENSE COPIES OF THIS MATERIAL. I'M
11:11AM 15 GOING TO ASK YOU, ALL OF YOU, TO SEE IF YOU CAN MEET AND CONFER
11:11AM 16 ON AN AGREED UPON PROTECTIVE ORDER, WHATEVER, HOWEVER YOU WANT
11:11AM 17 TO CALL THAT, THAT WOULD ENCOMPASS ALSO USE. I DON'T WANT THIS
11:11AM 18 INFORMATION DISTRIBUTED IN ANY WAY TO THE PUBLIC. IT'S NOT
11:12AM 19 PUBLIC INFORMATION. IT'S FOR TRIAL PREPARATION AND POTENTIAL
11:12AM 20 TRIAL USE ONLY.

11:12AM 21 IF THERE'S CONCERN ABOUT, AS THE DEFENSE INDICATED, ABOUT
11:12AM 22 BRADY ISSUES OR ISSUES THAT YOU DON'T WANT THE GOVERNMENT TO
11:12AM 23 USE, YOU CAN ALWAYS COME TO THE COURT AGAIN TO PROVIDE
11:12AM 24 INFORMATION ABOUT WHATEVER IT IS THAT YOU FEEL YOU NEED TO DO
11:12AM 25 IN EX PARTE, NOT EX PARTE, BUT AN IN CAMERA OR SOME OTHER TYPE

1 OF PROCESS.

2 AGAIN, I WANT SUFFICIENT PROTECTION THAT THE DEFENSE WILL
3 PUT THIS INFORMATION AND KEEP IT UNDER LOCK AND KEY AND REVEAL
4 IT ONLY TO A DEFENSE TEAM. I'LL INVITE YOU TO MEET AND CONFER
5 ON ANY LIMITATIONS THAT THE GOVERNMENT FEELS WOULD BE
6 APPROPRIATE ON THAT, AND THAT ALSO THAT THE DEFENSE FEELS WOULD
7 BE APPROPRIATE ON THAT, WHETHER OR NOT THAT INFORMATION WOULD
8 BE AT THE LAW OFFICES, WHETHER OR NOT THERE SHOULD BE A LOG
9 KEPT OF ANY -- FIRST OF ALL, I DON'T THINK YOU NEED TO MAKE
10 COPIES OF IT, BUT --

11 MR. WADE: I THINK ONE COPY WOULD BE SUFFICIENT. I
12 WILL NOTE FOR THE COURT I HAVE RECEIVED NOTES IN TWO OR THREE
13 RECENT INDICTED CASES WITHOUT A PROTECTIVE ORDER, BUT WE'VE
14 DONE ALL OF THE WORK TO PUT A PROTECTIVE ORDER IN PLACE THAT
15 PROTECTS EVERYBODY'S INTEREST. WE MIGHT AS WELL JUST APPEND
16 THESE ONTO THAT AND GIVE THEM THE PROTECTION --

17 THE COURT: WELL, I HAVE CONCERNS.

18 MR. WADE: YES.

19 MR. BOSTIC: YOUR HONOR, JUST BRIEFLY. I UNDERSTAND
20 THE COURT IS VIEWING THIS ISSUE PRAGMATICALLY. IT WANTS THE
21 DEFENSE TO HAVE THE INFORMATION IT NEEDS TO TRY ITS CASE.

22 THE GOVERNMENT, OF COURSE, WANTS THE DEFENSE TO HAVE THE
23 INFORMATION IT'S ENTITLED TO UNDER BRADY AND THAT CASE LAW.

24 IF I COULD JUST MAKE A COUPLE OF POINTS.

25 THE COURT: PLEASE.

1 MR. BOSTIC: AND MAYBE TRY TO DISSUADE THE COURT
2 FROM ORDERING PRODUCTION OF THOSE NOTES OR AT LEAST MAKE A
3 RECORD.

4 I THINK THE PROBLEM HERE IS WE'RE TALKING ABOUT NOTES THAT
5 ARE GENERALLY NOT DISCOVERABLE. GOVERNMENT NOTES, AGENT NOTES
6 ARE NOT GENERALLY SOMETHING THAT NEEDS TO BE TURNED OVER. THEY
7 NEED TO BE TURNED OVER ONLY WHEN THEY CONTAIN BRADY INFORMATION
8 OR, SAY, A JENCKS STATEMENT THAT WAS NOT REFLECTED IN A
9 SUBSEQUENT REPORT PRODUCED TO THE DEFENSE.

10 SO HOW DO WE HANDLE MAKING SURE THAT THE BRADY INFORMATION
11 GOES TO THE DEFENSE?

12 WELL, AS I SAID, USUALLY THE GOVERNMENT MAKES THAT
13 DETERMINATION. IN FACT, IT'S NOT JUST TRADITION THAT SUGGESTS
14 THAT APPROACH, IT'S THE CASE LAW.

15 IN PARTICULAR, UNITED STATES VERSUS LUCAS, I BELIEVE THIS
16 WAS CITED IN THE GOVERNMENT'S BRIEFING, THIS IS A NINTH CIRCUIT
17 CASE FROM 2016. THE CITE IS 841 F.3D 796. AND IT SAYS, "IT IS
18 THE GOVERNMENT, NOT THE DEFENDANT OR THE TRIAL COURT, THAT
19 DECIDES PROSPECTIVELY WHAT INFORMATION, IF ANY, IS MATERIAL AND
20 MUST BE DISCLOSED UNDER BRADY."

21 SKIPPING A COUPLE OF SENTENCES IT SAYS, "BRADY DOES NOT
22 PERMIT A DEFENDANT TO SIT THROUGH INFORMATION HELD BY THE
23 GOVERNMENT TO DETERMINE MATERIALITY," AND THAT CITES A SUPREME
24 COURT CASE PENNSYLVANIA V. RITCHIE.

25 THAT'S EXACTLY WHAT WE'RE TALKING ABOUT HERE, AND THAT'S

11:15AM 1 THE OFFER THAT THE GOVERNMENT MADE TO THE DEFENSE TO ACTUALLY
11:15AM 2 ALLOW THE DEFENSE TO COME, QUOTE, "SIFT THROUGH INFORMATION
11:15AM 3 HELD BY THE GOVERNMENT AND MAKE THAT MATERIALITY
11:15AM 4 DETERMINATION."

11:15AM 5 SO THE GOVERNMENT TOOK THAT ADDITIONAL STEP. THE FURTHER
11:15AM 6 STEP OF JUST TURNING OVER ALL OF THOSE MATERIALS, MATERIALS
11:15AM 7 THAT GO BEYOND WHAT CONTAINS BRADY AND DISCOVERABLE
11:15AM 8 INFORMATION, THAT'S WHAT REPRESENTS AN EVEN GREATER DEPARTURE
11:15AM 9 FROM THE CASE LAW AND THE NINTH CIRCUIT LAW HERE. THAT'S WHAT
11:15AM 10 THE GOVERNMENT IS RESISTANT TO.

11:15AM 11 AND AGAIN, NOT TO RELY ON TRADITION, BUT THIS IS NOT
11:15AM 12 TYPICALLY DONE IN CASES. THE THINGS ABOUT THIS CASE THAT MAKE
11:15AM 13 IT UNIQUE, THE MEDIA ATTENTION, THE LOSS AMOUNT, THE NUMBER OF
11:15AM 14 VICTIMS, NONE OF THESE THINGS ENHANCE THE DEFENDANT'S BRADY
11:15AM 15 RIGHTS. THEY'RE ENTITLED TO WHAT THEY'RE ENTITLED TO, AND
11:15AM 16 THAT'S DEFINED BY THE CASE LAW.

11:15AM 17 SO THE GOVERNMENT IS HAPPY TO MEET AND CONFER WITH THE
11:15AM 18 DEFENSE, BUT I WOULD URGE THE COURT NOT TO --

11:15AM 19 THE COURT: THANK YOU, MR. BOSTIC. THANK YOU FOR
11:15AM 20 MAKING THAT RECORD REGARDING THE NINTH CIRCUIT CASES AND ALSO
11:16AM 21 THE UNIQUENESS OF THIS CASE AS YOU POINT OUT.

11:16AM 22 I SUPPOSE WHEN I LOOK AT THIS PARTICULAR ISSUE, AND AGAIN,
11:16AM 23 I DON'T MEAN TO -- THIS IS NOT PUNISHMENT FOR THE GOVERNMENT
11:16AM 24 BECAUSE OF THEIR GENEROSITY -- AND I'LL USE THAT WORD. YOU'VE
11:16AM 25 ALLOWED THEM TO LOOK AT IT ALREADY, AND THEY'VE SEEN IT, AND

11:16AM 1 THEY'VE HAD ACCESS TO IT. OKAY.

11:16AM 2 BECAUSE THEY'VE LOOKED AT IT NOW, THEY -- IT'S THE COURT'S
11:16AM 3 FINDING THAT THEY HAVE ALREADY LOOKED AT IT, AND THEY HAVE SEEN
11:16AM 4 IT, THEY SHOULD HAVE COPIES OF IT AVAILABLE TO THEM FOR THEIR
11:16AM 5 USE. OSTENSIBLY THE PROCESS THAT THE GOVERNMENT ENGAGED IN WAS
11:16AM 6 WE WON'T LOOK FOR BRADY. WE'LL LET YOU HAVE ACCESS TO THIS,
11:16AM 7 AND YOU CAN TELL US WHAT YOU THINK IS MATERIAL BRADY
11:16AM 8 INFORMATION. MATERIAL AS OPPOSED TO, WELL, THIS WITNESS SAID
11:16AM 9 IT HAPPENED AT 1:00 O'CLOCK OR THE OTHER WITNESS SAID IT
11:16AM 10 HAPPENED AT 1:15.

11:16AM 11 YOU KNOW, WE HAVE JURY INSTRUCTIONS ABOUT TWO PEOPLE
11:16AM 12 SEEING THE SAME EVENT AND REMEMBERING IT DIFFERENTLY. THAT'S
11:17AM 13 NOT NECESSARILY BRADY INFORMATION. THAT'S NORMAL HUMAN BEING
11:17AM 14 COGNITIVE RESPONSES TO OBSERVATIONS AND JURY INSTRUCTIONS SO
11:17AM 15 INFORM.

11:17AM 16 BUT THE GOVERNMENT HERE HAS PROVIDED THE DEFENSE AN
11:17AM 17 OPPORTUNITY TO LOOK AT THIS INFORMATION. WHEN I LOOKED AT
11:17AM 18 THIS, AND, AGAIN, I KNOW ONE OF THE CONCERNS I HAD WAS, WELL,
11:17AM 19 IS THE DEFENSE USING THIS AS A TOOL TO JUST GAIN ADDITIONAL
11:17AM 20 INFORMATION THAT IS BEYOND BRADY?

11:17AM 21 MY SENSE IS THAT SOME OF THIS INFORMATION PROBABLY EXTENDS
11:17AM 22 BEYOND BRADY. NOT ALL OF IT IS BRADY INFORMATION AND, YOU
11:17AM 23 KNOW, YOU'RE GOING TO HAVE COPIES OF THIS WHICH MAY OR MAY NOT
11:17AM 24 ENHANCE YOUR ABILITY TO EXAMINE WITNESSES BEYOND BRADY REASON.

11:17AM 25 THE GOVERNMENT HAS ENGAGED THIS, THEY HAVE ALLOWED YOU TO

1 LOOK AT IT, AND YOU'RE HERE ASKING FOR THIS INFORMATION BASED
2 ON BRADY, BUT WE ALL RECOGNIZE THAT NOT ALL OF THIS INFORMATION
3 IS BRADY. IT GOES BEYOND THAT.

4 MR. WADE: I THINK THAT'S FAIR, YOUR HONOR.
5 OBVIOUSLY IF THERE'S A PERFECTLY CONSISTENT STATEMENT IN NOTES
6 AND IT SHOWS UP IN THE 302 THAT'S NOT BRADY, AND WE WOULD NOT
7 NEED THE NOTES.

8 WE'RE HERE BECAUSE WE'RE FOCUSED ON MATERIAL
9 INCONSISTENCIES IN THE INFORMATION AND NOT HAVING -- AND THE
10 PRACTICAL ISSUES OF NOT HAVING TO BE IN SOME REVOLVING DOOR
11 BEFORE THE COURT TO TRY TO DEAL WITH THIS ISSUE IN A WAY THAT
12 DOESN'T REVEAL DEFENSE STRATEGY. THAT'S REALLY, I THINK, AS A
13 PRACTICAL MATTER WHY WE'RE HERE.

14 I THINK THAT AN ORDER OR MAYBE A DIRECTION FROM THE COURT
15 TO DO THIS WITH THE APPROPRIATE PROTECTIONS THAT IT'S JUST --
16 LIKE YOU SAY, YOUR HONOR SAID, WE ALREADY REVIEWED THE
17 MATERIAL. I DIDN'T FLIP THROUGH NEARLY EVERY PAGE ALTHOUGH I
18 DIDN'T CAREFULLY REVIEW EVERY PAGE.

19 AND WHAT WE DON'T WANT IS WE DON'T WANT TO GET INTO SOME
20 GAME OF JUDICIAL GOTCHA WITH THE GOVERNMENT. I NOW KNOW THAT
21 THERE ARE SOME SIGNIFICANT STATEMENTS IN THE NOTES THAT WERE
22 NOT IN THE MEMOS. A DIFFERENT WAY TO PLAY THIS IS SAY, WELL, I
23 CAN'T MEET THE BRADY OBLIGATIONS SO IT REMAINS WITH THE
24 GOVERNMENT BECAUSE I DON'T HAVE THE INFORMATION AND SEE IF THEY
25 MEET THEIR OBLIGATION.

11:19AM 1 I MEAN, IT DOESN'T MAKE SENSE. IT'S NOT THE WAY WE SHOULD
11:19AM 2 PROCEED AS LAWYERS BEFORE THE BAR.

11:19AM 3 I THINK THAT WE CAN DO THIS IN A WAY THAT IS PROTECTIVE OF
11:19AM 4 THE GOVERNMENT'S INTEREST AND HELP KEEP THIS CASE ON TRACK.

11:19AM 5 THE COURT: OKAY.

11:19AM 6 MR. BOSTIC: YOUR HONOR, IN LIGHT OF THE COURT'S AND
11:19AM 7 THE DEFENSE'S ACKNOWLEDGEMENT THAT SOME OF THIS INFORMATION
11:19AM 8 WILL NOT BE BRADY, IS THE GOVERNMENT CONTEMPLATING OR WOULD
11:19AM 9 THE -- EXCUSE ME, IS THE GOVERNMENT CONTEMPLATING OR WOULD THE
11:19AM 10 -- EXCUSE ME. IS THE COURT CONTEMPLATING OR WOULD THE COURT BE
11:19AM 11 OPEN TO AN ORDER THAT ALLOWS THE DEFENSE TO CONTINUE REVIEWING
11:19AM 12 THESE MATERIALS AT ITS OFFICES, IF NECESSARY, BUT TO RETAIN
11:19AM 13 COPIES PERMANENTLY ONLY OF BRADY MATERIALS?

11:19AM 14 THE COURT: WELL, THAT I THINK MAKES GOOD SENSE, I
11:19AM 15 DO. THIS IS A BRADY SEARCH, IF YOU WILL, AND ONE OF THE THINGS
11:20AM 16 THAT COULD HAPPEN IS THE GOVERNMENT WOULD RELEASE THE BINDERS,
11:20AM 17 THE 800 PAGES, WHATEVER THEY ARE, AND YOU WOULD HAVE THEM IN
11:20AM 18 YOUR OFFICE. YOU WOULD BE ABLE TO REVIEW THEM FOR YOUR BRADY
11:20AM 19 PURPOSES, AND I'M SURE YOU'LL TAKE NOTES OF OTHER INFORMATION
11:20AM 20 CONTAINED IN THERE.

11:20AM 21 BUT IF IT'S BRADY THAT YOU WANT, THEN YOU SHOULD BE ABLE
11:20AM 22 TO KEEP THE BRADY INFORMATION.

11:20AM 23 MR. WADE: AS A PRACTICAL MATTER, AND, AGAIN, THAT'S
11:20AM 24 REALLY WHAT THIS COMES DOWN TO, WE'RE NOT GOING TO PREPARE ALL
11:20AM 25 OF OUR CROSS-EXAMINATIONS IN THE NEXT 30 DAYS, 60 DAYS,

11:20AM 1 90 DAYS.

11:20AM 2 THE COURT: WHY NOT?

11:20AM 3 (LAUGHTER.)

11:20AM 4 MR. WADE: WE'RE TOO BUSY FIGHTING FOR AGENCY
11:20AM 5 DOCUMENTS IT TURNS OUT AND HAVING TO REVIEW THOSE.

11:20AM 6 SO IT WILL BE QUITE SOME TIME BEFORE WE'RE IN A WINDOW,
11:20AM 7 ALTHOUGH THERE WILL BE SOME WITNESSES WHO WE START TO WORK
11:20AM 8 THROUGH AND THERE WILL BE OTHER WITNESSES WHO, YOU KNOW, MAYBE
11:20AM 9 WE DEAL WITH CLOSER TO TRIAL OR IN TRIAL BECAUSE WE DON'T KNOW
11:20AM 10 WHO THE GOVERNMENT WITNESSES ARE.

11:20AM 11 SO I THINK WE CAN ACCOMMODATE THAT AND ACCOMMODATE ANY
11:21AM 12 PRIVACY CONCERNS BY RETURNING THE MATERIALS IMMEDIATELY AFTER
11:21AM 13 TRIAL OR AFTER THE CASE IS RESOLVED. I DON'T REALLY SEE THE
11:21AM 14 DIFFERENCE.

11:21AM 15 IF THERE'S NOT BRADY IN THERE, I'M NOT GOING TO USE THE
11:21AM 16 NOTES ANYWAY. I HAVE THE 302. I CAN USE THE 302. IF IT'S NOT
11:21AM 17 IN THE 302 AND IT'S INCONSISTENT, THEN I'LL USE THE NOTES.

11:21AM 18 AGAIN -- AND I WANT TO BE RESPECTFUL OF THE FACT THAT WE
11:21AM 19 WERE GIVEN ACCESS. I'VE GOTTEN NOTES OF THIS KIND IN MANY
11:21AM 20 CASES, AND THESE ARE NOT STATE SECRETS. THIS IS THE MOST
11:21AM 21 SENSIBLE WAY TO DO IT TO AVOID THAT BRADY OBLIGATION. IT'S A
11:21AM 22 HUGE BURDEN FOR THE GOVERNMENT AND ONE THAT THEY CAN'T
11:21AM 23 POSSIBLY, I WOULD SUGGEST, COMPLY WITH FULLY OR IT'S VERY
11:21AM 24 DIFFICULT TO. SO LET'S RELIEVE THEM OF THAT OBLIGATION.

11:21AM 25 MR. BOSTIC: AND WHILE I APPRECIATE THAT, YOUR

1 HONOR, THAT'S NOT WHAT MOTIVATED THIS OFFER THAT THE GOVERNMENT
2 MADE.

3 THE GOVERNMENT IS NOT SEEKING RELIEF FROM ITS BRADY
4 OBLIGATIONS AND WOULD HAPPILY BE RESPONSIBLE FOR THAT REVIEW
5 AND PRODUCTION AS IT DOES IN MOST CASES.

6 THE COURT: OKAY. WELL, THANK YOU VERY MUCH. THANK
7 YOU FOR THIS.

8 I AM GOING TO -- I GUESS I'LL ISSUE A SEPARATE ORDER ON
9 THIS, MR. BOSTIC, FOR YOUR TEAM TO PROVIDE TO THE DEFENSE
10 COPIES OF THIS MATERIAL, THIS 800 SOME PAGES.

11 I'LL LEAVE IT TO YOU AND GOOD COUNSEL TO MEET AND CONFER
12 ON ANY PROTECTIVE ORDERS, I'LL JUST CALL IT, THAT YOU THINK ARE
13 APPROPRIATE TO SECURE THE RELEASE THAT WOULD INCLUDE SOME OF
14 THE THINGS THAT WE'VE TALKED ABOUT THIS MORNING WITH COUNSEL,
15 SOME OF THE CONCERNS THAT I HAVE EXPRESSED ABOUT THIS
16 INFORMATION.

17 IT SEEMS TO ME THAT IT'S DIFFICULT TO -- IT WOULD BE
18 DIFFICULT FOR ME TO ORDER THE DEFENSE TO GET SOMETHING DONE
19 WITHIN A CERTAIN PERIOD OF TIME. GOD FORBID I WOULD ORDER
20 SOMEBODY TO PRODUCE SOMETHING IN 75 DAYS. THAT'S AN INCREDIBLE
21 FEAT.

22 BUT FOR THE TIME BEING I'LL ALLOW THE DEFENSE TO MAINTAIN,
23 MAINTAIN THESE BINDERS SUCH THAT THEY'RE SECURE ACCORDING TO
24 THE CONCERNS THAT I HAVE.

25 SHOULD THAT CHANGE, I CAN ALWAYS CHANGE THAT ORDER AS

11:23AM 1 NEEDED. BUT YOU'LL REVIEW THIS FOR THE BRADY MATERIAL AS
11:23AM 2 YOU'VE INDICATED, MR. WADE.

11:23AM 3 MR. WADE: WE WILL, YOUR HONOR.

11:23AM 4 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

11:23AM 5 THE COURT: OKAY.

11:23AM 6 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:23AM 7 THE COURT: ANYTHING FURTHER THAT WE HAVEN'T TOUCHED
11:23AM 8 ON?

11:23AM 9 MR. DOWNEY: YOUR HONOR, THERE WAS ONLY THE QUESTION
11:23AM 10 OF WE HAD PROPOSED A PRETRIAL SCHEDULE THAT INCLUDED SOME
11:23AM 11 GUESSES AS TO DATES. WE OBVIOUSLY DID NOT CONSULT WITH THE
11:23AM 12 COURT ABOUT HEARING DATES THAT WE SUGGESTED BUT OTHERWISE
11:23AM 13 AGREED ON ALL ASPECTS OF AN ORDER, AND I THINK SUBJECT TO THE
11:23AM 14 COURT'S CHECKING FOR ITS AVAILABILITY ON DATES AND THE COURT'S
11:23AM 15 REVIEW IT'S PREPARED TO BE ENTERED.

11:24AM 16 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. I'LL
11:24AM 17 LOOK AT THIS, AND I'LL SEE IF THERE'S ANY CONFLICTS WITH
11:24AM 18 ANYTHING WE HAVE PRESENTLY SET, AND I'LL ISSUE AN ORDER ON THIS
11:24AM 19 ACCORDINGLY.

11:24AM 20 MR. DOWNEY: YOUR HONOR, ONE OTHER MATTER.

11:24AM 21 THE COURT: YES.

11:24AM 22 MR. DOWNEY: THE COURT NEED NOT HAVE ANY CONCERN
11:24AM 23 THAT ANY MATERIAL ON ANY SUBJECT SHARED WITH MS. HOLMES OR HER
11:24AM 24 COUNSEL WILL BE DISCLOSED TO THE PRESS. WE WILL NOT BE HAVING
11:24AM 25 CONVERSATIONS WITH THE PRESS ON ANY SUBJECT DISCLOSING ANY

11:24AM 1 MATERIAL OR OTHERWISE BEING IN COMMUNICATION WITH THEM.

11:24AM 2 SO WE WILL WORK OUT THE ANTICIPATED PROTECTIVE ORDER AS WE

11:24AM 3 HAVE IN THE PAST, AND I WANT TO JUST GIVE THE COURT THAT

11:24AM 4 ASSURANCE.

11:24AM 5 THE COURT: THANK YOU VERY MUCH.

11:24AM 6 MR. BALWANI'S COUNSEL, DO YOU WISH TO --

11:24AM 7 MR. COOPERSMITH: NO, YOUR HONOR. WE WON'T, AS I'VE

11:24AM 8 SAID BEFORE, BE SHARING ANY OF THE INFORMATION UNDER THE

11:24AM 9 PROTECTIVE ORDER WITH THE PRESS OF COURSE.

11:24AM 10 THE COURT: YOU JOIN YOUR COLLEAGUE'S COMMENTS ABOUT

11:24AM 11 HIS INTENT AND THEIR INTENT NOT TO SHARE ANY OF THIS

11:25AM 12 INFORMATION WITH THE PRESS OR IN ANY TYPE OF PRESS CONFERENCE?

11:25AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

11:25AM 14 THE COURT: OR ANYTHING LIKE THAT?

11:25AM 15 MR. COOPERSMITH: YES, YOUR HONOR.

11:25AM 16 THE COURT: OKAY. THANK YOU VERY MUCH.

11:25AM 17 ANYTHING FURTHER FROM THE GOVERNMENT?

11:25AM 18 MR. SCHENK: NO. THANK YOU.

11:25AM 19 MR. DOWNEY: NO. THANK YOU.

11:25AM 20 THE COURT: WE CAN ADJOURN TODAY. THERE WAS A

11:25AM 21 REQUEST, I THINK, TODAY TO HAVE AN IN CAMERA HEARING.

11:25AM 22 MR. DOWNEY: THERE WAS, YOUR HONOR, YES, BY COUNSEL

11:25AM 23 FOR MS. HOLMES.

11:25AM 24 THE COURT: RIGHT. OKAY. I'LL GRANT THAT REQUEST.

11:25AM 25 WE'LL TAKE A RECESS NOW. THE COURT DID RECEIVE A REQUEST FROM

11:25AM 1 COUNSEL FOR AN IN CAMERA HEARING REGARDING THE MATTER, AND
11:25AM 2 I'LL -- WE'LL TAKE THAT UP AFTER WE CLEAR THE COURTROOM AND
11:25AM 3 TAKE A BRIEF RECESS.

11:25AM 4 MR. DOWNEY: THANK YOU, YOUR HONOR.

11:25AM 5 THE COURT: THANK YOU. TIME REMAINS EXCLUDED AS TO
11:25AM 6 BOTH DEFENDANTS TO THE TRIAL DATE THAT WE HAVE SET FOR NEXT
11:25AM 7 YEAR. SO TIME REMAINS EXCLUDED TO ALLOW FOR EFFECTIVE
11:25AM 8 PREPARATION OF COUNSEL.

11:25AM 9 ALL RIGHT. THANK YOU.

11:26AM 10 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:26AM 11 MR. LEACH: THANK YOU, YOUR HONOR.

11:26AM 12 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

11:26AM 13 MR. WADE: THANK YOU, YOUR HONOR.

11:26AM 14 THE CLERK: COURT IS ADJOURNED.

11:26AM 15 (COURT CONCLUDED AT 11:26 A.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JULY 19, 2019